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CURRENT LEGISLATION AND DECISIONS

NOTES

Conflict of Laws — Erie Doctrine — Federal Countervailing Considerations

An Illinois domiciliary bought a plane in Nebraska from an agent for Beech Aircraft Corporation, a Delaware corporation with its principle place of business in Kansas. The new owner flew his plane to Florida, then to South Carolina where it was serviced on an overnight stop by Dixie Aviation Company, and then on to Tennessee where a crash killed all persons aboard. Suit was brought in a South Carolina federal district court by decedents' representatives against Dixie for negligent service and against Beech for negligent manufacture. Beech contested the court's jurisdiction on the ground¹ that since a South Carolina "door-closing" statute² would bar these foreign plaintiffs from asserting their foreign cause of action in a South Carolina state court, they should similarly be barred from the South Carolina federal court when jurisdiction is based on diversity of citizenship. The district judge upheld jurisdiction, and Beech appealed.³ *Held, affirmed and remanded*: Federal courts must follow state jurisdiction-limiting practices *unless* affirmative federal countervailing considerations, such as those found to exist in the instant case, require a different result. *Szantay v. Beech Aircraft Corp.*, 349 F.2d 60 (4th Cir. 1965).

It has long been held that the Constitution forbids certain limitations that a state may attempt to impose on the jurisdiction of its courts. One such restriction is the privileges and immunities clause contained in Article IV of the Constitution, which in general terms forbids discrimination by one state against the citizens of another.⁴ In order to circumvent this inhibition, state legislatures couch state jurisdiction-limiting statutes in terms of residents and non-residents rather than in terms of citizens.

¹ Beech also objected to the findings of its "sufficient contacts" with South Carolina to permit service pursuant to FED. R. Civ. P. 4(d)(7), and to the service on its exclusive South Carolina dealer as its agent. Adverse rulings of the district court, *Szantay v. Beech Aircraft Corp.*, 237 F. Supp. 393 (E.D.S.C. 1965), were affirmed without discussion by the Fourth Circuit, 349 F.2d at 62. Neither point is treated in this discussion.

² S.C. CODE ANN. ch. 3, § 10-214 (1962): "An action against a corporation created by or under the laws of any other state . . . may be brought . . . by a plaintiff not a resident of this State when the cause of action shall have arisen . . . within this State."

³ An interlocutory appeal pursuant to 28 U.S.C. § 1292(b) (1964) was allowed because of the "controlling question of law as to which there is substantial ground for difference of opinion."

⁴ *McKnett v. St. Louis & S.F. Ry.*, 292 U.S. 230 (1934).

The full faith and credit clause⁵ prohibits a state from refusing to enforce a valid judgment obtained in a sister state,⁶ and the same clause also restricts a state's freedom to bar actions based on rights created by the laws of another state.⁷

Though the limitation which a state places upon the jurisdiction of its courts is determined to be constitutionally valid, a question may remain as to whether that limitation is binding upon the federal courts sitting in the state. The answer, past and present, is illustrative of the swinging pendulum of legal evolution. During the era of *Swift v. Tyson*,⁸ federal courts in diversity cases could apply rules of common law independent of the unwritten law of the state as declared by its highest court; thus, a *non-statutory* state policy could safely be ignored.⁹ Some cases¹⁰ of the period even went so far as to approve the overriding of a state statute. In 1912 the Supreme Court allowed an action in federal court which would have been refused in state court because the corporate plaintiff had failed to register as required by state statute: "The State could not prescribe the quality of suitors in the courts of the United States, and could not deprive of their privileges those who were entitled under the Constitution and Laws of the United States to resort to the Federal Courts. . . ."¹¹ Although language such as this was later declared "obsolete insofar as [it is] . . . based on a view of diversity"¹² which was valid only so long as *Swift v. Tyson* was supreme, the decision has never been overruled per se, and the force of its reasoning is perhaps still alive.¹³

In 1938 *Swift v. Tyson* was overruled by the landmark decision of *Erie R.R. v. Tomkins*,¹⁴ in which the plaintiff, Tomkins, was injured while walking on defendant railroad's right-of-way in Pennsylvania. The district court ignored a Pennsylvania Supreme Court decision holding that persons who walk on a railroad's right-of-way are trespassers, and gave judgment to Tomkins. In reversing, the United States Supreme Court held that henceforth in diversity actions the substantive law of the state would be applied, both statutory and case law. Federal procedural law would continue to be applied. *Erie* was later explained and extended by *Guaranty Trust Co. v. York*¹⁵ where, in a contest involving the attempted application of a state statute of limitations, the Supreme Court defined state substantive law as that which may substantially affect the outcome of the case.

In two cases shortly after *York*, the Supreme Court was presented with plaintiffs in diversity suits attempting to institute actions which state

⁵ See note 45 *infra*.

⁶ *Kenney v. Supreme Lodge of the World, Loyal Order of the Moose*, 252 U.S. 411 (1920).

⁷ *Broderick v. Rosner*, 294 U.S. 629 (1935).

⁸ 41 U.S. (16 Pet.) 1 (1842).

⁹ E.g., *Baltimore & O. R.R. v. Baugh*, 149 U.S. 368 (1893).

¹⁰ E.g., *Barrow S.S. Co. v. Kane*, 170 U.S. 100 (1898); and *David Lupton's Sons Co. v. Automobile Club of America*, 225 U.S. 489 (1912).

¹¹ *David Lupton's Sons Co.*, *supra* note 10, at 500.

¹² *Angel v. Bullington*, 330 U.S. 183, 192 (1947).

¹³ *First Nat'l Bank v. United Air Lines, Inc.*, 342 U.S. 396, 398-401 (1952).

¹⁴ 304 U.S. 64 (1938).

¹⁵ 326 U.S. 99 (1945).

statutes barred from the local courts. In the first, *Angel v. Bullington*,¹⁶ a North Carolina statute forbade the cause of action itself. It was the policy of the state as declared by the legislature that deficiency judgments would not be rendered. The Supreme Court ruled that this state policy would apply equally to the federal courts: "The essence of diversity jurisdiction is that a federal court enforce State law and State policy."¹⁷ In the second case, *Woods v. Interstate Realty Co.*,¹⁸ the particular plaintiff rather than the cause of action was prohibited. A Mississippi statute barred foreign corporations which were not licensed by the state from bringing an action in state court. Again the Supreme Court gave the state policy effect in federal court.

These two cases illustrate the illusive simplicity inherent in early applications of *York*. The state policies in question would have affected the outcome in each case; therefore, state law controlled. Although both of these cases, and others like them,¹⁹ would undoubtedly be decided similarly today,²⁰ such broad language was used in the two opinions that judges in subsequent cases on lower levels were inclined to interpret quite literally the *York* language, "[A] federal court adjudicating a State-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State."²¹ The outcome-determinative test thus devolved into little more than a definition standard, but, as the Supreme Court has recently noted,²² such a result was not at all what had been contemplated by *York*. Questions of federal-state conflict arising under *Erie* were to be resolved not by the automatic answer of a definition-hunting expedition, but rather by a balancing of interests approach based ultimately on a generous dose of judicial wisdom. The means for that wisdom to assert itself within the framework of *Erie-York* was announced in 1958 in *Byrd v. Blue Ridge Rural Elec. Co-op.*,²³ a minor landmark case in its own right—a decision which, though not establishing a completely new direction, reaffirmed and made clearer what the Court now indicates it originally meant in *York*.

In *Blue Ridge* the issue was whether a federal court was bound by a South Carolina statute requiring the judge rather than the jury to decide questions of employment in connection with workmen's compensation. The Supreme Court, though recognizing that federal courts in diversity jurisdiction must respect state definitions of state-created rights and obligations, found the basic issue to be whether the subject at question was *bound up* with state rights in such a way that the application of state

¹⁶ 330 U.S. 183 (1947).

¹⁷ *Id.* at 191.

¹⁸ 337 U.S. 535 (1949).

¹⁹ E.g., *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949).

²⁰ See, e.g., *Selama-Dindings Plantations, Ltd. v. Durham*, 216 F. Supp. 104 (S.D. Ohio 1963), *aff'd sub nom. Selama-Dindings Plantations, Ltd. v. Cincinnati Union Stock Yard Co.*, 337 F.2d 949 (6th Cir. 1964); *Armor Bronze & Silver Co. v. Chittick*, 221 F. Supp. 505 (D. Conn. 1963); and *Pellerin Laundry Mach. Sales Co. v. Hogue*, 219 F. Supp. 629 (W.D. Ark. 1963). But see, *Trane Co. v. Trane Mfg., Inc.*, 190 F. Supp. 443 (D. Conn. 1960).

²¹ *Guaranty Trust Co. v. York*, 326 U.S. 99, 108 (1945).

²² *Hanna v. Plumer*, 380 U.S. 460 (1965).

²³ 356 U.S. 525 (1958).

law was constitutionally required. The Court held that the state policy involved was merely a part of the judicial machinery, not the substantive right. Nonetheless, *York* indicates that, in absence of other considerations, the federal court in diversity jurisdiction must conform to all state rules that may affect the outcome. Confronted with the literal language of *York*, the *Blue Ridge* Court concluded:

[W]ere "outcome" the only consideration, a strong case might appear for saying that the federal court should follow the state practice. But there are affirmative countervailing considerations at work here. The federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction. An essential characteristic of that system is the manner in which, in civil common-law actions, it distributes functions between judge and jury. . . .²⁴

The Court held that the federal courts were therefore not bound by this state requirement.

The courts of appeals in various circuits have since given recognition to this idea of "affirmative federal countervailing considerations" to justify bypassing local law. In *Monarch Ins. Co. v. Spach*,²⁵ a diversity action for recovery under a fire insurance policy, the court was faced on the one hand with a Florida statute which would bar certain evidence, and on the other with Rule 43(a)²⁶ of the Federal Rules of Civil Procedure which would allow it. In resolving the conflict in favor of the federal rules, the court found as a countervailing consideration the "indispensable necessity that a tribunal, if it is to be an independent court administering the law, must have the capacity to regulate the manner by which cases are to be tried and facts are to be presented. . . ."²⁷ In *Moss v. Associated Transp., Inc.*,²⁸ a Tennessee constitutional provision which forbade separating issues of liability and damages gave way to federal rule 42(b).²⁹ The court, though enforcing only a single rule in a limited fact situation, indicated a much broader approval of the federal rules as the ultimate authority: "We feel that the importance of maintaining uniform procedure in federal trials calls for a clear showing of possible substantive impact [of any state policy in question] before departing from federal rules."³⁰ And the Supreme Court in *Hanna v. Plumer*³¹ gave effect to federal rule 4(d)(1),³² notwithstanding a state law to the contrary. While upholding the federal method of service instead of applying a special Massachusetts exception, the Court refocused its attention on the much broader problem of the meaning of the *Erie-York* rule:

²⁴ *Id.* at 537.

²⁵ 281 F.2d 401 (5th Cir. 1960).

²⁶ FED. R. CIV. P. 43(a): "[T]he statute or rule which favors the reception of evidence governs"

²⁷ *Monarch Ins. Co. v. Spach*, 281 F.2d 401, 407 (5th Cir. 1960). *Accord*, *Lumbermen's Mut. Cas. Co. v. Wright*, 322 F.2d 759 (5th Cir. 1963); and *Dallas County v. Commercial Union Assur. Co.*, 286 F.2d 388 (5th Cir. 1961).

²⁸ 344 F.2d 23 (6th Cir. 1965).

²⁹ FED. R. CIV. P. 42(b): "The court, in furtherance of convenience or to avoid prejudice . . . may order a separate trial"

³⁰ *Moss v. Associated Transp., Inc.*, 344 F.2d 23, 27 (6th Cir. 1965).

³¹ 380 U.S. 460 (1965).

³² FED. R. CIV. P. 4(d)(1).

"Outcome-determination" analysis was never intended to serve as a talisman. . . . Indeed, the message of York itself is that choices between federal and state law are to be made not by application of any automatic, "litmus paper" criterion, but rather by reference to the policies underlying the Erie rule. . . .

* * *

The "outcome-determinative" test therefore cannot be read without reference to the twin aims of the Erie rule: discouragement of forum shopping and avoidance of inequitable administration of the laws.³³

Not only the federal rules, but also statutes and even unwritten federal policy may be countervailing considerations. In *Callan v. Lillybelle, Ltd.*,³⁴ where a wrongful death action was transferred from a district court in New Jersey to one in New York in order to get personal service, the New York statute of limitations was held not to require dismissal of the action. The countervailing federal consideration was 28 U.S.C. 1404(a), which allows transfer in the interest of justice. In *Phipps v. Nederlandsche Amerikaansche Stoomvaart, Maats*³⁵ the Ninth Circuit held that a state rule concerning directed verdicts related to the internal functions of the court and therefore would not govern in federal courts.

A number of courts in applying the test have concluded that federal considerations have *not* outweighed local policy. Thus, the court in *O'Connor v. Western Freight Ass'n*³⁶ concluded that federal rule 15,³⁷ allowing amendment, does not override a New York policy that the defense of minority is waived unless pleaded. Other courts have failed to find sufficient federal considerations to justify ignoring a New York rule governing the patient-physician privilege,³⁸ a West Virginia statute denying a foreign administrator the right to act within the state,³⁹ or a South Carolina statute requiring insurance companies to begin actions based on misrepresentation within two years from the issuance date of the policy.⁴⁰ In *Bowman v. Curt G. Joa, Inc.*⁴¹ the court noted that although the federal rules prescribe the method of service on a foreign corporation, they do not answer the more basic question of whether a corporation is even subject to service. On this point local law governs.

The courts confronting such federal-state conflicts as these have thus far been without any unifying standard other than the general *Blue*

³³ *Hanna v. Plumer*, 380 U.S. at 466-68.

³⁴ 39 F.R.D. 600 (S.D.N.Y. 1966). *Accord*, *Brown v. Pyle*, 310 F.2d 95 (5th Cir. 1962) (where the federal consideration found was 28 U.S.C. § 1391(a)).

³⁵ 259 F.2d 143 (9th Cir. 1958).

³⁶ 202 F. Supp. 561 (S.D.N.Y. 1962).

³⁷ Fed. R. Civ. P. 15.

³⁸ *Massachusetts Mut. Life Ins. Co. v. Brei*, 311 F.2d 463 (2d Cir. 1962).

³⁹ *Fennell v. Monongahela Power Co.*, 350 F.2d 867 (4th Cir. 1965).

⁴⁰ *Bolick v. Prudential Ins. Co. of America*, 249 F. Supp. 735 (E.D.S.C. 1966).

⁴¹ 361 F.2d 706 (4th Cir. 1966). In holding that North Carolina law would determine whether a Wisconsin corporation was amenable to process, the court noted that *Blue Ridge* and *Hanna* "do not alter the Erie rationale so as to warrant *disregarding* the interest of the state in controlling the jurisdictional reach of the courts sitting herein." (Emphasis added.) *Id.* at 711. *Cf. Arrowsmith v. United Press Int'l*, 320 F.2d 219 (2d Cir. 1963). The district court opinion in the present case of *Szantay v. Beech Aircraft Corp.*, 237 F. Supp. 393 (E.D.S.C. 1965), deals at length with the primary question of Beech's amenability to process. South Carolina's interests here were quite clearly not disregarded.

Ridge language of countervailing considerations. Judge Sobeloff, in the present case of *Szantay v. Beech Aircraft Corp.*, was confronted on the one hand with a corporate defendant, Beech, which clearly could not be sued in the state courts, and on the other hand with a plaintiff, Szantay, asserting related claims of negligence against both Beech and a South Carolina corporation, Dixie, which clearly could be sued only within South Carolina. The judge reviewed the relatively recent development of the law, and then drew three conclusions concerning federal-state conflicts which summarize quite neatly the present state of the law:

(1) If the state provision, whether legislatively adopted or judicially declared, is the substantive right or obligation at issue, it is constitutionally controlling.

(2) If the state provision is procedure intimately bound up with the state right or obligation, it is likewise constitutionally controlling.

(3) If the state procedural provision is not intimately bound up with the right being enforced but its application would substantially affect the outcome of the litigation, the federal diversity court must still apply it unless there are affirmative countervailing federal considerations. This is not deemed a constitutional requirement but one dictated by comity.⁴²

After quickly determining that the South Carolina statute was neither the right itself nor bound up with the cause of action (which was created by Tennessee law) and that the statute did not declare strong state policy,⁴³ Judge Sobeloff needed only to find affirmative countervailing considerations to justify bypassing local policy.

First, the judge noted that even though the South Carolina statute does not violate the privileges and immunities clause of the Constitution,⁴⁴ the purpose of diversity of citizenship jurisdiction is to overcome territorial discrimination in general and to guarantee that a non-resident receives the same legal treatment as would a resident in state court. Second, even though the statute may not directly violate the full faith and credit clause, the law does prevent enforcement of the Tennessee wrongful death action in the South Carolina state court.⁴⁵ The judge apparently felt that since the statute vaguely breached the spirit if not the letter of these two constitutional provision, this somewhat tenuous situation in itself constituted a countervailing consideration.

⁴² *Szantay v. Beech Aircraft Corp.*, 349 F.2d 60, 63-64 (4th Cir. 1965).

⁴³ As did, for example, the North Carolina policy in *Angel v. Bullington*, 330 U.S. 183 (1947), against all deficiency judgments. South Carolina here had no policy against death actions in general, or even against foreign death actions, but only against foreign death actions asserted by a foreign plaintiff against a foreign defendant. This point is significant because a weak state policy is more easily overcome by countervailing federal considerations than a strong state policy.

⁴⁴ See, e.g., *Douglas v. New York, N.H. & H.R.R.*, 279 U.S. 377 (1929).

⁴⁵ Full faith and credit problems are beyond the scope of this discussion, but it may be briefly noted that a state's denying enforcement of a right created by another state may violate constitutional standards unless the state refusal is based on a local policy strong enough to override federal considerations of maximum enforcement by each state of rights and obligations created by others. E.g., in *Hughes v. Fetter*, 341 U.S. 609 (1951), the Wisconsin state court was forced to entertain an action based on an Illinois created right. In *First Nat'l Bank v. United Air Lines, Inc.*, 342 U.S. 396 (1952), a federal court was allowed to entertain a diversity action based on a foreign death claim in the face of a state statute to the contrary. Mr. Justice Jackson concurred in the result, but urged reasoning similar to that in *David Lupton's Sons Co. v. Automobile Club of America*, 225 U.S. 489 (1912).

Also intimated as a countervailing consideration was the federal doctrine of *forum non conveniens*.⁴⁶ The Supreme Court recently expanded this doctrine rather curiously in *Van Dusen v. Barrack*⁴⁷ where it ruled that the 1404(a) language "where it might have been brought" does not restrict the availability of a convenient federal forum by referring to state law rules; and thus, transfer may be obtained to a federal court in a district where in fact the action could not have originally been brought in a state court because of state rules. The judge in *Szantay* abruptly and without discussion expanded this new rule even further by applying it backwards: reasoning circuitously that since the action could have been transferred from Tennessee to South Carolina, it could therefore be brought originally in South Carolina. However, this is not a holding; it is merely one of the several countervailing considerations.

The final and undoubtedly decisive consideration was the "federal policy to encourage efficient joinder in multi-party actions,"⁴⁸ evidenced by the Federal Rules of Civil Procedure.⁴⁹ And, as stated in *Monarch v. Spach*, the Federal Rules of Civil Procedure are themselves a countervailing consideration: "The broad aim [of the Federal Rules] . . . was to reverse the philosophy of *conformity* to local state procedure and establish, with but few exceptions, an approach of uniformity within the federal judicial trial system."⁵⁰

Establishing uniformity necessarily entails ignoring many state provisions, including even some state rules which could affect the outcome. Although the Supreme Court now indicates that the intent of *York* was not to elevate state law to a position of mandatory supremacy, the real intent was generally unrecognized by federal courts until re-emphasized in *Blue Ridge*. In creating the countervailing considerations concept, the Court struck a delicate compromise between the rigidity of the early application of the *York* outcome test, and the potential chaos of a "non-test" such as that embodied in *Swift v. Tyson*, where judges were left more or less free to make up the rules as they played the game. That abstract balance was formulated by Judge Sobeloff in *Szantay* into a clear, concise, and workable rule of law.

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⁴⁶ 28 U.S.C. § 1404(a) (1964): "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." See for general background *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947); and *Koster v. (American) Lumbermens Mut. Cas. Co.*, 330 U.S. 518 (1947). See also *Willis v. Weil Pump Co.*, 222 F.2d 261 (2d Cir. 1955), where a non-statutory state policy similar in effect to South Carolina's door-closing statute was not given effect in the federal court: "The refusal of the New York court to deal with such a suit is but a state rule of *forum non conveniens*. Such a rule does not control a federal court, since Congress has explicitly legislated in that field"

⁴⁷ 376 U.S. 612 (1964).

⁴⁸ *Szantay v. Beech Aircraft Corp.*, 349 F.2d at 66.

⁴⁹ FED. R. CIV. P. 18-21, 23.

⁵⁰ 281 F.2d at 408.

7% Investment Tax Credit — Subsidized Air Carriers — Section 203(e) of the Internal Revenue Act of 1964

North Central Airlines claimed a tax credit for "qualified investments" in its 1962 federal income tax return.¹ The investment credit reduced North Central's taxes by approximately \$25,660. Subsequently, North Central computed its "profit-sharing" subsidy² and applied therefor to the Civil Aeronautics Board.³ North Central, however, failed to include the 7% investment tax credit in the computation of the subsidy. The Civil Aeronautics Board, upon auditing North Central's profit-sharing report, notified North Central that it would, for profit-sharing purposes, recognize the investment credit as effecting a reduction in North Central's 1962 federal income taxes. North Central objected that such a treatment of the investment tax credit was not in accord with congressional intent. However, the Board, in its final determination,⁴ held that only taxes that were actually paid were to be recognized for purposes of computing the profit-sharing subsidy,⁵ and that North Central by ignoring the \$25,660 tax reduction (which resulted from the investment tax credit) was seeking to claim a larger tax bill than it had actually paid. The Board's position was that the purposes of the investment credit are "already provided" for subsidized airlines in Section 406(b)(3) of the Federal Aviation Act of 1958, and that therefore section 203(e) of the Revenue Act of 1964 was incompatible with it (because application of the latter would allow the sum to the carrier twice). Consequently, the CAB increased North Central's 1962 after-tax profit by \$25,660, the amount of the investment tax credit, and correspondingly reduced its claim for the subsidy by that amount. North Central accepted the subsidy check for the reduced amount,

¹ It did so by virtue of the 7% investment tax credit allowed by Congress in 1962. INT. REV. CODE OF 1954, §§ 38, 46-48. This credit was recently suspended by Congress: 80 Stat. 1508 (1966).

² Under § 406 of the Federal Aviation Act of 1958, 72 Stat. 763, as amended, 76 Stat. 145 (1962), 49 U.S.C. § 1376 (1964), airlines that possess certificates authorizing them to carry mail receive a subsidy composed of two parts: (1) All receive "service" mail pay, which compensates the airlines for the actual transportation of the mail, and for the equipment and facilities required to effect that carriage. (2) In addition, several local service airlines, including North Central Airlines, receive "subsidy" mail pay. This payment is not based on the cost of carrying the mail, but on the "need" of the carrier for monies to enable it to cover operating losses, if any, and to earn a "fair return" on its investment so that it can continue the development of domestic air transportation. (Since the fifties only locals have received this "subsidy" mail pay.) Under the CAB's "profit-sharing" system, each airline authorized to receive "subsidy" mail pay computes its profit according to the Board's guidelines: (1) if the carrier's after-tax profit is less than a fair return on its investment, it would not contribute to the profit-sharing plan; but (2) if the carrier's profit exceeds a fair return, the carrier must refund out of its subsidy a certain percentage of said excess. Local-Serv. Class Subsidy Rate Investigation, 34 C.A.B. 416 (1961). This order has been replaced by Class Rate II, CAB Docket No. 14080, CAB Order No. E-19118 (20 Dec. 1962).

³ Filed on CAB Form T-88.

⁴ CAB Docket No. 14080, CAB Order No. E-21663 (11 Jan. 1965), pursuant to the above-mentioned profit-sharing provisions of Local-Serv. Class Subsidy Rate Investigation, 34 C.A.B. 416, 418, 428 (1961).

⁵ *Ibid.*

but informed the CAB that it did not accept the profit-sharing computation. It then filed a petition for review in the Court of Appeals for the District of Columbia Circuit. *Held, reversed*: The CAB was not entitled to reduce North Central's profit-sharing subsidy by the amount of its investment tax credit. *North Central Airlines, Inc. v. CAB*, 363 F.2d 983 (D.C. Cir. 1966).

In 1962 Congress amended the Internal Revenue Code of 1954 to provide a credit against federal income taxes for capital invested in new equipment or facilities.⁶ Thereafter, disagreement arose as to how this credit should be applied to regulated industries. Certain regulatory agencies, such as the FPC and the ICC, tried to "flow through" the benefit of this investment tax credit in the form of lower rates to their industry's consumers rather than allowing it to be used for investment. To prevent this "flow through," Congress passed Section 203(e) of the Revenue Act of 1964,⁷ which provides:

It was the intent of Congress in providing an investment credit under section 38 of the Internal Revenue Code of 1954, and it is the intent of the Congress in repealing the reduction in basis required by section 48(g) of such Code, to provide an incentive for modernization and growth of private industry (including that portion thereof which is regulated). Accordingly, Congress does not intend that any agency . . . shall, without the consent of the taxpayer, use . . . any credit against tax allowed by section 38 of such Code, to reduce such taxpayer's Federal income taxes for the purpose of establishing the cost of service of the taxpayer or to accomplish a similar result by any other method.⁸

It is clear from the legislative history of section 203(e) that Congress' attention was focused primarily, if not entirely, upon the "flow through" problem. It was stated in the House and Senate reports:

[I]n the case of . . . public utility property Congress is merely directing the Federal regulatory agencies not to "flow" the benefits of the investment credit "through" to the customers In the case of the other property Congress is directing the Federal regulatory agencies not to "flow" this benefit "through" at any time.⁹

In debate, Congress paid little attention to the problem of the CAB and subsidized airlines.¹⁰ Moreover, the few references to the Board were made within the context of the "flow through" question.¹¹ Hence, the legislative history indicates that Congress did not specifically foresee subsidized

⁶ INT. REV. CODE OF 1954, §§ 38, 46-48, suspended by 80 Stat. 1508 (1966).

⁷ INT. REV. CODE OF 1954, § 38 proviso, §§ 46-48, suspended by 80 Stat. 1508 (1966).

⁸ *Ibid.*

⁹ H.R. REP. NO. 749, 88th Cong., 1st Sess. 36-37 (1964); and S. REP. NO. 830, 88th Cong., 2d Sess. 42-43 (1964). It is perhaps noteworthy that, although the purpose of section 203(e) received adverse comment in the press and support in the Senate, the subject of subsidized industries was not mentioned or considered by either. See, e.g., *Gift to the Utilities*, N.Y. Times, 4 Feb. 1964, § 4, p. 3; *Loophole to be Closed*, Washington Post, 5 Feb. 1964, § 3, p. 2; and Senator Tower's remarks at 110 CONG. REC. 1986 (1964).

¹⁰ 109 CONG. REC. 17905, 17909, 18044 (1963); 110 CONG. REC. 1284, 1292, 1297, 1345-46, 1358, 1360, 1441-53, 1502, 1883, 1889, 2038-42, 2049-84, 2128-29, 2203-05, 2356, 2390 (1964).

¹¹ 110 CONG. REC. 1357, 1502, 2056, 2061, 2063, 2067-68, 2084 (1964).

airlines as being affected by section 203 (e). For example, Senator Long of Louisiana, the floor manager of the bill, stated:¹²

While it may have the power to do so, the Civil Aeronautics Board does not regulate the rates of airlines. . . .

* * *

So far as the CAB is concerned, that regulatory agency does not fix the rates of airlines. Those rates are fixed by competition. Therefore, so far as that agency is concerned, this [section 203 (e)] does not make any difference.

So there is no real reason why that agency should become involved one way or the other.¹³

The import of Senator Long's remarks seems to be that section 203 (e) was conceptualized as applying only to "commercial" ratemaking regulatory agencies, such as the FPC, and not to the CAB, because the latter is essentially a "subsidy" regulatory agency with no power to "flow through" the tax credit benefits to an airline's customers in the form of lower fares.¹⁴

On the other hand, the fact that the CAB could not effect a "flow through" of the investment tax credit to airline customers does not necessarily mean it could not deprive an airline of the credit in some other manner. It is true that Senator Long's observation, *i.e.*, that "there is no real reason why that agency should become involved one way or the other," can be interpreted as indicating that the prohibition of section 203 (e) was specifically intended not to extend to the CAB or its subsidy function. However, it seems more likely that the senator meant nothing more than that he had not fully thought out the problem. Otherwise, he would have realized that there exist means other than the "flow through" by which a regulatory agency could effectively neutralize the tax credit benefit. Yet, in view of Senator Long's remarks and his apparently intentional distinction between "regulated" and "subsidized" industries, and in view of section 203 (e)'s reference only to "regulated" industries, it is manifestly possible that Congress intended section 203 (e) to apply only to regulated industries.

In any event, it is clear that the court in *North Central* gave little consideration to the difference between a regulated industry and a subsidized industry, or to the potentially significant difference between "cost of service," as used in section 203 (e), and "need," as used in Section 406 of the Federal Aviation Act. While the court treated the terms as equivalent, neither "regulated" and "subsidized," nor "cost of service" and "need," are necessarily synonymous.

The "cost of service" is computed for a "regulated" industry so that a regulatory agency can establish a rate that will insure a certain percentage of profit; the "need" calculation is made to insure that the subsidized airlines receive a fair return. Thus, while the ultimate functions of

¹² 110 CONG. REC. 1502 (1964).

¹³ 110 CONG. REC. 2061 (1964).

¹⁴ In the context of establishing class rates, the Board's ratemaking power under § 1002 (d) of the Federal Aviation Act of 1958 would seem to be inapplicable.

the "cost of service" and "need" calculations are similar in that each is a factor in the determination of a reasonable profit for the industry involved, their immediate purposes and methods of computation are quite dissimilar. With regard to a regulated industry, the regulatory agency, after determining the cost of service, establishes a maximum rate that the utility can charge. In the case of a subsidized industry, the regulatory agency assists the subsidized industry, not because that industry may charge too much, but because, unaided, it cannot charge its customers enough to provide good service and at the same time earn a sufficient profit. Thus, regulatory ratemaking is basically an inhibitory function, and regulatory subsidization is basically a support, or assistance, function. The former is termed "commercial" ratemaking because it deals with market conditions, supply and demand, etc., and sets rates in relation thereto; the latter is termed "subsidy" ratemaking because it simply makes up the necessary deficiency and does not deal directly with supply and demand or other similar market factors.¹⁵

The court of appeals, instead of scrutinizing the above factors and distinctions, preferred to employ, implicitly, the "rule of literalness" in interpreting section 203(e) in spite of the fact that it seemed to be at least cognizant of section 406¹⁶ and of the legislative history surrounding section 203(e).¹⁷ The court justified its approach by stating that it would not

adhere to a reading of statutory language reaching results that are . . . at variance with demonstrable legislative history or policy, but this is not such a case.¹⁸

In support of this statement, the court cited *United States v. American Trucking Ass'n, Inc.* in which the Court stated:

In the interpretation of statutes, the function of the courts is . . . to construe the language so as to give effect to the intent of Congress. There is no invariable rule for the discovery of that intention. To take a few words from their context and with them thus isolated to attempt to determine their meaning, certainly would not contribute greatly to the discovery of the purpose of the draftsmen of a statute, particularly in a law drawn to meet many needs of a major occupation.¹⁹

It is significant that in that same case the Supreme Court also stated:

When aid to construction of the meaning of the words, as used in the statute is available, there certainly can be no "rule of law" which forbids its use, however clear the words may appear on "superficial examination."²⁰

The court's interpretation of the effect of section 203(e) allows subsi-

¹⁵ While the CAB does not set rates per se for the airlines, as does the FPC, for example, for natural gas production, the CAB has a duty under § 404 of the Federal Aviation Act to see that air carriers establish "reasonable . . . rates, fares, and charges." The CAB's main ratemaking function derives from § 406.

¹⁶ *North Central Airlines, Inc. v. CAB*, 363 F.2d 983, 984 (D.C. Cir. 1966).

¹⁷ *Id.* at 985.

¹⁸ *Ibid.*

¹⁹ 310 U.S. 534, 542-43 (1940).

²⁰ *Id.* at 543-44.

dized airlines to receive two economic boosts for the same investment: (1) pursuant to the combined effect of Sections 38 and 46-48 of the Internal Revenue Code²¹ and Section 203(e) of the Revenue Act of 1964;²² and (2) pursuant to the combined effect of the CAB's Class Rate I Order²³ and Section 406(b)(3) of the Federal Aviation Act of 1958.²⁴ In arguing the case before the court, the CAB contended that in calculating North Central's 1962 profit-sharing subsidy allowance must be made for the amount of the investment tax credit. This computation was required by the Board's "actual tax" policy.²⁵ This "actual tax" policy, the CAB argued, was a basic extension of the statutory limitations ("need" and "all other revenue") imposed on a subsidy payable under Section 406(b)(3) of the Federal Aviation Act of 1958. In essence, the Board said that its refusal to grant a subsidy in the amount of the investment tax credit would not frustrate the purpose of Section 203(e) of the Revenue Act of 1964 because North Central had already been subsidized to the extent necessary to promote modernization by investment. In reply to this argument, the court said, in essence, that the Board's refusal to grant the full subsidy claimed by North Central did frustrate the purpose of section 203(e) and that North Central was entitled to the full benefit of the investment credit because the credit was a "bounty payable on an event (new investment) that reflected an intention wished by the Government. . . ."²⁶

The court rested its decision on the "similar result" clause of section 203(e), which precluded regulatory agencies from accomplishing "a similar result [to deny industry the benefit of the tax credit] by any other method."

This last clause seems to . . . cover the problem before us. . . . The use of credit . . . to reduce taxes in the case of a mail subsidy being computed on a need basis, does not serve to establish the cost of service. But it accomplishes a similar result by this other method. It deprives the subsidized carrier of participation in the decreed largesse.

* * * *

Congress decreed that a utility should receive . . . a . . . benefit from a tax credit over and above the "cost of service" to which it is entitled Obviously these purposes [modernization of equipment] apply to the utility which receives its return not wholly in consumer rates but partly in Government subsidy.²⁷

The court stated that it was "obvious" that the investment credit and section 203(e) were meant to apply to subsidized industries. That this is "obvious" is questionable in view of (1) the scanty legislative history

²¹ INT. REV. CODE OF 1954, §§ 38, proviso, 46-48, suspended by 80 Stat. 1508 (1966).

²² INT. REV. CODE OF 1954, § 38 proviso, suspended by 80 Stat. 1508 (1966).

²³ Local-Serv. Class Subsidy Rate Investigation, 34 C.A.B. 416 (1961).

²⁴ 76 Stat. 145 (1962), 49 U.S.C. § 1376 (1964).

²⁵ The CAB's "actual tax" policy is simply that it will consider, in computing a subsidy (the carrier's "need") only those taxes actually paid to the Government. This policy was upheld in *Summerfield v. CAB*, 207 F.2d 200, 206 (D.C. Cir. 1953), *aff'd sub nom.* *Western Air Lines, Inc. v. CAB*, 347 U.S. 67 (1954).

²⁶ *North Central Airlines, Inc. v. CAB*, 363 F.2d at 985.

²⁷ *Ibid.*

in this regard; (2) the ambiguities raised by the technical language involved, such as "cost of service" and "need"; (3) the possibly significant distinctions between regulated and subsidized industries; and (4) the ample investment credit already provided subsidized airlines via Section 406(b) of the Federal Aviation Act and the CAB's Class Rate I Order thereunder. By passing section 203(e), Congress expressed its intention that rate-regulated industries should not be forced to lower their charges to the public and thereby be deprived of the benefit of the investment tax credit. But this does not necessarily mean that Congress thereby also intended that previously subsidized industries should be granted even more (investment) support by the Government.

Thus, in the final analysis, justification for the decision must rest on the public policy considerations which prompted the investment credit legislation. While Congress probably had only the rate-regulated industries in mind when it adopted section 203(e), the fact remains that Congress enacted the investment tax credit in 1962 as a fiscal measure to boost a then-lagging economy. Whether or not Congress consciously intended section 203(e) to apply to subsidized airlines, it nevertheless adopted broad-sweep language which, by its terms, applies to them. And, in view of the initial congressional purpose of granting governmental "largesse" to industries which invested in new equipment, the court's decision here does no violence to the underlying legislative intent. In sum, while the CAB probably was correct in arguing that a carrier's investment "need" is sufficiently taken into account via the section 406 calculation, the court concluded that Congress wanted qualifying industry—regulated or not, and subsidized or not—to gain something more than actual "need." The conclusion may not be as "obvious" to others as to the court, but neither can it be said to be without justification.²⁸

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²⁸ There are three general rules that can be applied to determine the intention of the legislature: (1) the rule of literalness; (2) the rule of the "equity of the statute"; and (3) the rule of extrinsic evidence, *i.e.*, the legislative history of the statute. Any method may be used in statutory construction, so long as the conclusion reflects the intent of the legislature. In construing revenue laws a reasonable construction is favored, but these laws often extend into technical fields, in which case reference to the commercial usage becomes imperative. In addition, the history of the legislation, the committee reports, other statutes read *in pari materia*, and all other related provisions of the act may be used as guides. See 2 & 3 SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION §§ 4501-10; 4701-07; 5001; 5004; 5817; 6701-11; 8450 (3d ed. 1943).

Torts — Slip and Fall — Theories of Recovery

A fall in an airport lounge occurred when the plaintiff, a passenger who had been waiting in line to board an aircraft, moved backward with the natural movement of the crowd and tripped over a piece of hand luggage which had been placed on the floor by the passenger immediately to the rear of the plaintiff. An action was brought against the common carrier to whom the lounge was leased in the Federal District Court for the Northern District of Texas on the grounds that the likelihood of a serious injury growing out of such a practice was readily foreseeable and that the carrier had failed in its duty to take the necessary precautions of warning the plaintiff of such a dangerous practice. A directed verdict was granted to the defendant. *Held, reversed and remanded*: The evidence was sufficient to support a finding for the plaintiff; therefore, the issue of negligence should have been submitted to the jury. *Garrett v. American Airlines, Inc.*, 332 F.2d 939 (5th Cir. 1964).

It is a well established legal principle that an owner or possessor of land has a responsibility to business invitees to warn them of dangerous conditions which are either known or should reasonably have been discovered by the owner or possessor in the exercise of due care.¹ However, the duty to warn extends only to those conditions which are not "open and obvious"² to the business invitee. The owner or possessor is not required to foresee the precise injury or the precise person injured, but is required to foresee only the likelihood of an injury endangering that class of persons to which the plaintiff belongs.³ In applying this general rule to static or isolated conditions, particularly the slip-and-fall situation, it has become the rule in Texas and in other jurisdictions that the owner or possessor of land is liable for injuries growing out of such a condition when the owner-possessor or his agent created the dangerous condition, saw it created by another, or where the dangerous condition existed for such a period of time that the owner or possessor is charged with constructive knowledge of its existence.⁴ The established rule of law, then, is that in order to avoid

¹ See, e.g., *Talbott v. Chicago & Nw. Ry.*, 243 F.2d 322 (8th Cir. 1957); *Forbes v. Pullman Co.*, 137 S.C. 433, 135 S.E. 563 (1926); *Bennevendo v. Houston Transit Co.*, 238 S.W.2d 271 (Tex. Civ. App. 1951), *error ref. n.r.e.*; *Steed v. Gulf, C. & S.F. Ry.*, 231 S.W. 714 (Tex. Comm. App. 1921); *Pecos & N.T. Ry. v. Twichell*, 145 S.W. 319 (Tex. Civ. App. 1912); *Missouri, K. & T. Ry. v. Smith*, 133 S.W. 695 (Tex. Civ. App. 1910) (rev'd on other grounds); and *Dumas v. Missouri, K. & T. Ry.*, 43 S.W. 908 (Tex. Civ. App. 1897).

² See, e.g., *Houston Nat'l Bank v. Adair*, 146 Tex. 387, 207 S.W.2d 374 (1948); *Parker Food Stores v. Pierce*, 374 S.W.2d 699 (Tex. Civ. App. 1964), *error ref. n.r.e.*; *Marshall v. San Jacinto Bldg. Co.*, 367 S.W.2d 372 (Tex. Civ. App. 1963), *error ref. n.r.e.*; and *Acme Laundry Co. v. Ford*, 284 S.W.2d 745 (Tex. Civ. App. 1955), *error ref. n.r.e.*

³ See, e.g., *Fuller v. Southwest Greyhound Lines, Inc.*, 331 S.W.2d 455 (Tex. Civ. App. 1960), *error ref. n.r.e.*; *City Ice Delivery Co. v. Suggs*, 60 S.W.2d 538 (Tex. Civ. App. 1933), *error ref.*; and *Trinity & B. V. Ry. v. McCune*, 154 S.W. 237 (Tex. Civ. App. 1913).

⁴ "Under Texas law slip-and-fall negligence requires a showing (1) that the defendant put the foreign substance on the floor; or (2) that the substance had been on the floor for such a period of

a directed verdict for the defendant, the plaintiff must present evidence which tends to prove that the allegedly dangerous isolated condition arose out of one of these three circumstances.

However, isolated conditions are classified separately from conditions which are continuous in nature, and different tests of liability apply to the respective classifications.⁵ If the condition results from an isolated, unexpected happening, the owner or possessor of the property may not be held liable for injuries resulting therefrom unless knowledge, actual or constructive, can be proven. Constructive knowledge may be shown where the condition has existed long enough to charge the owner or possessor with such knowledge. However, where an owner or possessor permits the existence of an unsafe condition, which is so common, continuous and protracted that resulting injuries might reasonably have been anticipated from its existence, he will not be permitted to deny knowledge of that condition.⁶ In *Great Atl. & Pac. Tea Co. v. Randolph*,⁷ the defendant was using a meat chopping block so close to a passage-way regularly used by customers that meat shavings fell into this passage-way, resulting in a fall and an injury to the plaintiff. It was found that "the presence of these clippings on the pathway was no occasional, isolated, or unexpected happening, but was the usual, continuous, and foreseen result incident to the use of the meat block beside a pathway."⁸ Although there was nothing to show that the defendant had actual knowledge of the particular piece of meat in the passage-way, the court held that "a jury could infer knowledge thereof by the defendant with consequent negligence in permitting such dangerous condition of things to continue."⁹ Rather than involving an isolated condition such as a banana peel recently discarded by some third person, this case concerned a dangerous condition which grew out of the manner in which the defendant carried on his business. Thus, the condition which proximately caused the plaintiff's injuries in *Randolph* arose from the business practices of the defendant.¹⁰

The same general rules of law apply where the dangerous condition, either isolated or continuous, is created by a third party.¹¹ Clearly, if an owner or possessor of property uses reasonable care to keep his premises free of dangerous obstacles and if a foreign substance is dropped by a

time that it would have been discovered and removed by the defendant had he exercised ordinary care." *Melton v. Greyhound Corp.*, 354 F.2d 970, 973 n.9 (5th Cir. 1965). See also, *F. W. Woolworth Co. v. Bell*, 291 F.2d 912 (5th Cir. 1961); *J. C. Penney Co. v. Norris*, 250 F.2d 385 (5th Cir. 1957); *Windham v. Atlantic Coast Line Ry.*, 71 F.2d 115 (5th Cir. 1934); *Airline Motor Coaches v. Caver*, 148 Tex. 521, 226 S.W.2d 830 (1950); *Stimson v. Milwaukee, L. S. & W. Ry.*, 75 Wis. 381, 44 N.W. 748 (1890); *Holeman v. Greyhound Corp.*, 396 S.W.2d 507 (Tex. Civ. App. 1965), *error ref. n.r.e.*; and *Blackmon v. Gulf, C. & S. F. Ry.*, 56 S.W.2d 199 (Tex. Civ. App. 1932), *error ref.*

⁵ See *Melton v. Greyhound Corp.*, 354 F.2d 970, 973 n.9 (5th Cir. 1965) for a statement of the test for isolated conditions.

⁶ *Rankin v. S. S. Kresge Co.*, 59 F. Supp. 613 (N.D. W. Va. 1945).

⁷ 64 F.2d 247 (3d Cir. 1933).

⁸ *Id.* at 248.

⁹ *Ibid.*

¹⁰ *Accord*, *Moone v. Kroger Grocery & Baking Co.*, 148 S.W.2d 628 (Mo. Ct. of App. 1941).

¹¹ *Rankin v. S. S. Kresge Co.*, 59 F. Supp. 613 (N.D. W. Va. 1945); *Moone v. Kroger Grocery & Baking Co.*, 148 S.W.2d 628 (Mo. Ct. of App. 1941).

business invitee as a mere chance occurrence, the owner or possessor is not responsible for injuries sustained thereby until he has knowledge, actual or constructive, of the existence of such a dangerous condition.¹² That is, an owner or possessor of property is not bound to anticipate an independent and unexpected act of negligence by a third party. Accordingly, situations arise in which the negligence of a third party is a new and independent cause which destroys the causal relation between a wrongful act or omission on the part of the owner-possessor of the property and the plaintiff's injury.¹³

The rule that the causal relation between the owner-possessor's act or omission and the resulting injury may be destroyed by an independent, intervening act of negligence by a third party is qualified, however, where the intervening act of negligence was foreseen or could have been foreseen by the original wrongdoer in the exercise of due care.¹⁴ In such a situation the original act of negligence remains the proximate cause of the resulting injury even though an intervening act of negligence on the part of a third party was a cause of the injury. In *Rankin v. S. S. Kresge Co.*,¹⁵ it was found that the dropping of a substance (ice cream) by third parties was not a mere chance occurrence, or an isolated, unexpected happening, but was the usual, continuous and foreseen result, incident to the manner in which the defendant was serving school children and conducting its lunch counter business. In that case the jury found that the practice of the third parties, which the defendant failed to prevent as a result of its normal business practices, was so common, continuous and protracted that the resulting injuries to the plaintiff might reasonably have been anticipated by the defendant. "The negligence of a third person as an 'intervening efficient cause' can be relied upon as a defense only where it is the sole cause of the injury, and not when it concurs with that of the defendant. Intervention of a subsequent tortfeasor does not absolve the first, where the second wrong and its consequences are fairly foreseeable from the start."¹⁶ Thus, as a matter of law, the defendant was not allowed to deny his knowledge of the dangerous condition and was held liable for injuries caused by the failure to exercise reasonable care to warn thereof.

The dangerous activity, insofar as the manner in which liability arises, is quite similar to the dangerous condition which is continuous in nature,

¹² *Rankin v. S. S. Kresge Co.*, 59 F. Supp. 613 (N.D. W. Va. 1945).

¹³ *St. Louis & Sw. Ry. v. Barr*, 148 S.W.2d 924 (Tex. Civ. App. 1941), *error dism. judm. corr.*; *Burlington-R. I. Ry. v. Davis*, 123 S.W.2d 1002 (Tex. Civ. App. 1939), *error dism. judm. corr.*; and *Van Velzer v. Houston Land & Trust Co.*, 16 S.W.2d 865 (Tex. Civ. App. 1929). The act of negligence on the part of a third party was found to be an intervening cause where the plaintiff was knocked to the floor and injured when a door was unexpectedly and unforeseeably opened by a third party. Although it was found that "where a person invites another to his place of business, he assumes toward the invitee certain duties and if he negligently permits a danger of any kind to exist which results in injury to the person invited, the inviter is answerable for the consequences of such injury," it was further reasoned that an independent act of negligence by a third party may be such an intervening cause as to destroy the causal relation between the original negligence and the resulting injury. *Sheridan v. Great Atl. & Pac. Tea Co.*, 353 Pa. 11, 44 A.2d 280, 283 (1945).

¹⁴ *Roadway Transp. Co. v. Gray*, 135 S.W.2d 200 (Tex. Civ. App. 1939); *Schaff v. Ellison*, 255 S.W. 680 (Tex. Civ. App. 1923), *error ref.*

¹⁵ 59 F. Supp. 613 (N.D. W. Va. 1945).

¹⁶ *Id.* at 618.

but it is clearly distinguishable from the isolated condition. "A possessor is subject to liability to his invitees for physical harm caused to them by his failure to carry on his activities with reasonable care for their safety if, but only if, he should expect that they will not discover or realize the danger or will fail to protect themselves against it."¹⁷ It should be noted that the requirement of knowledge, actual or constructive, is not present when the plaintiff attempts to predicate liability upon the failure to exercise due care in carrying on an activity. *Knowledge* does not enter into the vocabulary of *dangerous activity*. In describing the distinction between liability arising out of dangerous isolated conditions and that growing out of dangerous activities, the judiciary has often used the terms "passive negligence" and "active negligence."¹⁸

"Passive negligence" denotes negligence which permits defects, obstacles or pitfalls to exist upon the premises, in other words, negligence which causes dangers arising from the physical condition of the land itself. "Active negligence," on the other hand, is negligence occurring in connection with activities conducted on the premises, as, for example, negligence in the operation of machinery or of moving vehicles whereby a person lawfully upon the premises is injured.¹⁹

As is the case with dangerous conditions, instances may arise in which a third party is responsible in part for the injury resulting from a dangerous activity, and the same general rules of proximate and intervening causes apply. In *Horne Motors, Inc. v. Latimer*²⁰ the plaintiff was injured in an after dark collision between a truck and the vehicle in which he was a passenger. The driver raised the defense that the blinding headlights of oncoming vehicles constituted a new and independent cause of the collision. The court ruled, "The act of a third person, intervening and contributing a condition necessary to the injurious effect of the original negligence, will not excuse the first wrongdoer if such an act might have been foreseen [the defendant admitting that blinding headlights are a common nighttime driving hazard]."²¹

In the instant case the plaintiff fell backwards over a piece of luggage placed behind her by a fellow passenger in the airport lounge. In the lower court a directed verdict was returned against the plaintiff because she did not offer proof either that the defendant-carrier had placed the zipper bag on the floor, that the defendant had seen it placed there by another, or that the zipper bag remained on the floor for a sufficient period of time to charge the defendant with constructive notice of its presence.²² The plaintiff urged the appellate court to grant a reversal principally on the following grounds: (1) a condition existed of which the defendant

¹⁷ RESTATEMENT (SECOND), TORTS § 341(a) (1965).

¹⁸ *Potter Title & Trust Co. v. Young*, 367 Pa. 239, 80 A.2d 76 (1951); *Boggus Motor Co. v. Standridge*, 138 S.W.2d 643 (Tex. Civ. App. 1940); *St. Louis & Sw. Ry. v. Balthrop*, 167 S.W. 246 (Tex. Civ. App. 1914); and *Houston Belt & Terminal Ry. v. O'Leary*, 136 S.W. 601 (Tex. Civ. App. 1911).

¹⁹ *Potter Title & Trust Co. v. Young*, 367 Pa. 239, 80 A.2d 76, 78 (1951).

²⁰ 148 S.W.2d 1000 (Tex. Civ. App. 1941).

²¹ *Id.* at 1005.

²² *Garrett v. American Airlines, Inc.*, 332 F.2d 939, 942 (5th Cir. 1964).

had full knowledge; (2) the defendant had reason to anticipate the likelihood of an injury; and (3) failing to attempt to prevent the condition, the defendant was guilty of actionable negligence. *Houston Elec. Co. v. Bragg*,²³ the primary authority upon which the plaintiff relied, involved a plaintiff's fall over a suitcase placed in the aisle of the bus by a fellow passenger. Adequate storage space was provided for luggage elsewhere in the bus, but the suitcase was placed in the aisle at a time when the bus was crowded with shoppers. The Texas Commission of Appeals stated, "The negligence here alleged does not depend on knowledge of the presence of the obstruction after it is placed in the aisle, but is based on the anticipation of the obstruction and failure to use care to prevent it."²⁴

An agent of the carrier in the case at hand stated before the trial court that it is the common practice of modern air travelers to take hand luggage with them onto the aircraft and admitted that the travelers are not requested to keep the luggage off the floor of the waiting lounge. The plaintiff thus requested reversal on the ground that the carrier should have foreseen the likelihood of an injury growing out of a condition of which it had complete cognizance (*i.e.*, the habits and customs of its passengers) and should have warned them of the danger. It was further alleged by the plaintiff that the test which the trial court adopted²⁵ is correctly applicable only to injuries resulting from matters of "infrequent occurrence," such as the "banana peel in-the-aisle" situation, and that foreseeability is the only test required for those accidents which result from matters of "common occurrence," such as the one involved in this case. The plaintiff saw nothing more in this case than a determination of whether, under all the circumstances, the defendant used due care to prevent injury to its business invitees, in view of the rule that the creator of a dangerous condition is charged with notice of the danger caused by his own creation.²⁶

The defendant made the general contention that no duty existed on its part to warn of a condition of which it had no knowledge. Affirmation of the decision of the lower court was urged on the grounds that in other jurisdictions, as well as in Texas, it is the established rule that negligence in this character of cases must be shown by evidence of one of two things: "(1) that an employee of the company placed the article in the aisle, or (2) that the article had been in the aisle long enough to justify the inference that a failure to discover and remove the same was due to a

²³ 276 S.W. 641 (Tex. Comm. of App. 1925), *adopted*.

²⁴ *Id.* at 643.

²⁵ Brief for Petitioner, p. 17, *Garrett v. American Airlines, Inc.*, 332 F.2d 939 (5th Cir. 1964). Generally, an owner or possessor of land is held to only a normal degree of care while the common carrier is held to a high degree of care. A matter which also varies among the several jurisdictions is the question of what situations the carrier is held to the high degree of care, as opposed to the normal degree of care. Texas, the jurisdiction in which the cause of action arose and under whose law the instant case was tried, does not distinguish between injuries sustained in the station or on the premises of a common carrier prior to boarding and those incurred while actually aboard the carrier, insofar as the degree of care required. In Texas it is settled that a carrier owes its passengers the same high degree of care for their safety while they are at the station premises as it owes them while they are in actual transportation aboard the carrier. See also, *Fort Worth & D. C. Ry. v. Kidwell*, 112 Tex. 89, 245 S.W. 667 (1922); *Bryning v. Missouri, K. & T. Ry.*, 167 S.W. 826 (Tex. Civ. App. 1914), *error ref.*

²⁶ Brief for Petitioner, p. 20, *Garrett v. American Airlines, Inc.*, 332 F.2d 939 (5th Cir. 1964).

want of proper care."²⁷ More specifically, the defendant urged that since the plaintiff was unable to show how long the luggage was on the floor or by what means it came to be on the floor, affirmation of the trial court decision should be granted. The defendant reasoned that, since the petitioner had failed to show either of the above factors, the second element of her claim—that the defendant should have foreseen that a passenger would mishandle his luggage and should have taken steps to prevent the resulting injury—was immaterial.

The appellate court held: "Totally misapprehending its duty and approaching the matter as a 'banana peel in-the-aisle' case,"²⁸ the defendant was successful in persuading the trial court that the correct test to be applied in this situation was that of the isolated condition. The court went on to say:

[I]t [the carrier] was totally indifferent to a fourth basis of liability and one, incidentally, which is recognized in grocery store slip-and-fall cases. It is that a carrier must reasonably take cognizance of the habits, customs and practices followed generally by its passengers insofar as those actions present hazards to its business invitees, and with an awareness of these hazards, it must take reasonably appropriate steps to minimize or avoid likely harm.²⁹

The court observed that in Texas it is precisely this element of anticipation which distinguishes carrier liability from non-liability.³⁰ In view of the testimony by the air carrier's agent that it is the practice of present day air travelers to carry hand luggage with them aboard aircraft, since no steps were taken by the carrier toward either avoiding this danger or warning the travelers of the practice, the appellate court found that there was sufficient evidence to require submission of the question of negligence to the jury. A Florida case, *Pogue v. Great Atl. & Pac. Tea Co.*,³¹ was the prime authority relied upon by the appellate court. In that case the plaintiff slipped upon a lettuce leaf, the presence of which should have been anticipated by the defendant because other similar substances were continually present on its floors as a result of its normal business practices. The court in *Pogue* declared, "The rule of negligence applicable to the facts alleged in the complaint is that where the possibility or probability of consequences can be reasonably foreseen, anticipated or prevented, an actor who does not use ordinary and reasonable care to avoid such consequences will be deemed guilty of negligence."³² The *Pogue* court cited another Florida decision, *Wells v. Palm Beach Kennel Club*,³³ as authority for the

²⁷ Brief for Respondent, p. 3, *Garrett v. American Airlines, Inc.*, 332 F.2d 939 (5th Cir. 1964).

²⁸ *Garrett v. American Airlines, Inc.*, 332 F.2d 939, 942 (5th Cir. 1964).

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ 242 F.2d 575, 578 (5th Cir. 1957). "Plaintiff, appellant, concedes that, as to the particular lettuce leaf and carrot tops, no such evidence was available [that the defendant had time to discover and remove]. She relies instead upon evidence tending to show that the store keeper, by his method of operation, had created a dangerous condition which caused the presence on the floor of the foreign material in question, and that, under such circumstances, the plaintiff is not required to introduce further proof."

³² *Id.* at 581.

³³ Where the defendant sold bottled drinks at its amusement grounds and did not provide receptacles in which the empty bottles could be placed, a danger was brought about in the act of selling the refreshments. 160 Fla. 502, 35 So.2d 720 (1948).

theory that where a danger is created by customary business practices, the creator is charged with knowledge of its existence and the requisite duty to prevent injuries.

While the present decision is ultimately correct insofar as the rights of the parties are concerned, the court failed to utilize this excellent opportunity to delineate clearly the distinctions between the several theories of recovery which are applicable to the facts at hand. The plaintiff based her claim on the theory of continuous conditions and the defendant phrased its defense in terms of isolated conditions. In holding for the plaintiff, however, the court did not necessarily adopt her theory of liability. The court's phrase, "fourth basis of liability," can easily be interpreted as a fourth method for finding knowledge of a dangerous condition. The other three bases of liability are obviously the three tests for finding knowledge of static or isolated conditions, and the fourth test, then, is whether the condition was continuous, *i.e.*, so common and repetitive as to require the defendant to "take cognizance"³⁴ of it. This fourth test for finding knowledge on the part of the defendant could very well have been the "fourth basis of liability" to which the court was alluding, for the existence of similar luggage on the floor of the lounge seems to have been so common, continuous and protracted that it is aptly termed a *continuous* condition, and the defendant could have been properly charged with knowledge of the zipperbag. Moreover, the act of the third party in placing the bag directly behind the plaintiff was not such an intervening act of negligence as to destroy the causal relation between the original breach of duty and the resulting injury. The act of negligence on the part of the third party was readily foreseeable by the defendant in the exercise of due care. Thus, the theory of continuous conditions seems to be clearly applicable.

Nevertheless, the court left some doubt as to the theory of liability it was applying by its use of the term "actions," which is a word of art ordinarily associated only with *activities*. Moreover, the event which caused the injury, that is, the placing of the hand bag on the floor behind the plaintiff could be viewed as a part of the carrying on of the defendant's business and, consequently, as an activity. However, if the defendant's liability is to be predicated upon the act of some third person, it is necessary to impute the act of that third party to the defendant. The most likely method of doing so is to classify those passengers who carry their luggage as agents of the air carrier. Viewed in this light, the passengers were performing a service which the carrier was obligated to provide; furthermore, the passengers were encouraged and invited to do so by the carrier. Thus, the act of the third person in placing the luggage on the floor was a portion of the defendant's *business activities*.

It is impossible, then, in view of the rather imprecise wording of the court's holding, to determine whether the decision was based upon the theory of *continuous conditions* or upon the theory of *business activities* because both theories could be considered applicable to the instant facts.

³⁴ Garrett v. American Airlines, Inc., 332 F.2d 939, 942 (5th Cir. 1964).

It cannot be questioned, however, that the plaintiff was entitled to go to the jury on the question of the defendant's negligence. Nevertheless, submission to the jury does not guarantee plaintiff's ultimate recovery, for the questions of negligence, contributory negligence, assumption of risk and the open and obvious character of the condition remain to be determined. The decision of the appellate court does not represent a broadening of air carrier liability, for it merely seeks to hold this air carrier to its long-standing responsibility of exercising due care to protect its business invitees from harm.

Milton E. Douglass, Jr.

Federal Aviation Act — Statutory Interpretation — Inclusive Tours

On 11 March 1966 the CAB issued Special Regulation 378¹ on a five year experimental basis. This regulation granted the right to engage in domestic "inclusive tour" carriage to supplemental carriers² in conjunction with CAB approved tour operators. Thus, a tour operator was authorized to charter a plane from a supplemental and offer space to the general public on a per seat basis as part of an "inclusive tour" (a form of all expense paid tour).³ Subsequently, the trunkline carriers petitioned the Board to rescind the order, claiming that this type of charter would allow the supplemental carrier to offer "individually ticketed" service in competition with the trunklines. The CAB ruled that the Federal Aviation Act authorized it to issue certificates of public convenience and necessity to supplemental carriers to engage in "charter trips," that Congress invested the Board with the power to determine the limits of the term "charter trips," and that "inclusive tours" are within the scope of that term. The regular carriers petitioned for review of the Board's decision, contending that Special Regulation 378 exceeded the statutory limits⁴ of "charter trips." *Held, affirmed*: The legislative history of Section 101(33) of the Federal Aviation Act of 1958 reveals that the Board is free to evolve a definition of charter trips so long as the distinction between group and individually ticketed service is preserved. Here, the integrity of the charter concept is maintained because sufficient restrictions are imposed upon the grant of "inclusive tour" authority. *American Airlines, Inc. v. CAB*, 365 F.2d 939 (D.C. Cir. 1966).

The problem of striking a balance between the regular carriers and the supplementals in a rapidly expanding industry has been a difficult task for the CAB. The supplemental carrier group has borne several labels since World War II, and various restrictions have been placed upon this class with only limited success. Immediately after the war many surplus planes and former military pilots were available for conducting civilian carriage. The carriers formed from this source became known as "large irregular" carriers, for they had no established routes and flew only on

¹ Supplemental Air Serv. Proceeding, CAB Docket No. 13795, CAB Order No. E-23350 (11 March 1966).

² Federal Aviation Act of 1958, § 101(32), 72 Stat. 737, as amended, 76 Stat. 143 (1962), 49 U.S.C. § 1301(32) (1964). "Supplemental air carrier" means an air carrier holding a certificate of public convenience and necessity authorizing it to engage in supplemental air transportation.

³ Inclusive tour is generally synonymous with an "all-expense tour." The Board has adopted the term "inclusive tour" rather than "all-expense tour" because all expenses are not necessarily required to be included in the tour price.

⁴ Federal Aviation Act of 1958, § 101(33), 72 Stat. 737, as amended, 76 Stat. 143 (1962), 49 U.S.C. § 1301(33) (1964); and § 401(d)(3), 72 Stat. 754, as amended, 76 Stat. 143 (1962), 49 U.S.C. § 1371(d)(3) (1964).

an irregular basis. Granting this class of carrier a blanket exemption⁵ from certification was found not to be in keeping with the Board's policy of industry wide regulation. In the fifties the label was changed to "non-scheduled" and certificates to carry on charter and individually ticketed service were granted, provided that each "non-scheduled" carrier did not engage in more than ten flights per month between any two points. The ten-flight-per-month rule⁶ was abused by several of the "non-skeds" when they joined with travel agents in illegal pooling arrangements whereby certain carriers agreed to combine their ten flights per month in order to offer regularly scheduled service in direct competition with the regular carriers.

Recognizing this abuse and the non-skeds' poor safety record, Congress amended the Federal Aviation Act.⁷ Pursuant to this amendment, the certificates of public convenience and necessity that had been previously issued to the non-skeds were to be re-evaluated, and the carriers that met the certification standards of the amended act were to be issued, under section 401(d)(3),⁸ certificates of public convenience and necessity for "supplemental air transportation." Under section 101(33) "supplemental air transportation" is defined as:

charter trips in air transportation, other than the transportation of mails by aircraft, rendered pursuant to a certificate of public convenience and necessity issued pursuant to section 401(d)(3) of this Act *to supplement the scheduled service* authorized by certificates of public convenience and necessity issued pursuant to sections 401(d)(1) and (2) of this Act. (Emphasis added.)⁹

The amending legislation did not mention "inclusive tours" as being within the scope of charter service. The focal issue in regard to whether 101(33) authorizes inclusive tour service is the proper construction of the term "charter trips." The Senate version¹⁰ of the proposed legislation dealing with supplementals contained a definition of "charter service"¹¹ expressly authorizing "inclusive tours," while the House version¹² did not include a definition of charter service. The House committee stated that no binding definition of the term should be formulated but, rather, that

⁵ Large Irregular Carriers, Exemptions, 11 C.A.B. 609 (1950).

⁶ Large Irregular Air Carrier Investigation, 22 C.A.B. 838 (1955).

⁷ Public Law 87-528, 76 Stat. 143 (1962), amending various sections of the act.

⁸ Limitation found in § 401(d)(3), *supra* note 4:

In the case of an application for a certificate to engage in supplemental air transportation, the Board may issue a certificate . . . Any certificate issued pursuant to this paragraph shall contain such limitations as the Board shall find necessary to assure that the service rendered pursuant thereto will be limited to supplemental air transportation as defined in this Act.

⁹ 72 Stat. 737 (1958), as amended, 76 Stat. 143 (1962), 49 U.S.C. § 1301(33) (1964).

¹⁰ S. 1969, 87th Cong., 1st Sess. (1961).

¹¹ S. REP. NO. 688, 87th Cong., 1st Sess. 1 (1961):

"Charter Service" means air transportation performed by an air carrier holding a certificate of public convenience and necessity where the entire capacity of one or more aircraft has been engaged for the movement of persons and their baggage or for the movement of property on a time, mileage, or trip basis, but shall not include transportation services offered by an air carrier . . . under an arrangement with any person who provides or offers to provide transportation services to individual members of the general public, other than as a member of a group on an all-expense paid tour.

¹² H.R. 7318, 87th Cong., 1st Sess. (1961).

the authority to define "charter" should remain with the Board.¹³ Upon passage of the respective bills, a joint conference committee met and formulated a bill without a specific definition of "charter service," the committee report indicating that the House version had been adopted. During floor debate on the compromise bill, six of the seventeen member conference committee stated that the authority to engage in "inclusive tours" was not to be allowed under the proposed legislation.¹⁴ With this discrepancy still remaining between the committee report and the debate statements, the bill was passed 10 July 1962.

During the interim period prior to the issuance of permanent certificates, the Board issued authority to several supplementals to institute transatlantic "split charter" flights¹⁵ whereby a supplemental carrier could allow two groups to charter one plane. This ruling was promulgated to allow the supplemental carriers to offer to small groups a program similar to the regular carriers' price reduction on overseas coach flights for groups of twenty-five or more people. In *American Airlines, Inc. v. CAB*,¹⁶ the court decided that "split charters" were within the statutory limits of "charter," as contained in section 101(33) of the act, and that the program offered by the regular carriers was not sufficient to meet all the demands of the traveling public. This decision established the principle that the Board has the power to determine the meaning of the term "charter trips" so long as the distinction between "group" (charter)¹⁷ and "individually ticketed" service is maintained. Thus, the changing needs

¹³ H. REP. NO. 1177, 87th Cong., 1st Sess. 11 (1961):

The supplementals recommended that a definition of charter be written into the bill and this was given consideration by your committee. The bill passed by the Senate has such a definition.

Your committee, however, after considering the problem, came to the conclusion that under the circumstances, authority to define charter services should be left, as at present, with the Board, subject to the limitations contained in the reported bill. This is a very difficult subject and any effort to freeze a definition of charter service into law could well lead into complications.

¹⁴ Senator Scott stated:

The committee of conference wisely eliminated the Senate provision. The bill thus, in effect, confirms the established law as to a charter in air transportation. There should be no question about that. The Congress has considered, and rejected, a proposal to change the established meaning of charter so as to have permitted travel agent charters for all-expense tours. Such charters have no place in air transportation. This being the thrust of the congressional action, it would be clearly improper if the Civil Aeronautics Board were hereafter to undertake to rewrite the law and to authorize under guise of charter, all-expense tour operations. . . . 108 CONG. REC. 12284-85 (1962).

And Senator Thurmond remarked:

Air transportation has suffered from the abuses of individually ticketed operations. The law violations in this area have all too frequently extended to infractions of safety provisions as well. It is for this reason that I want to emphasize the insistence of Congress that supplemental charter operations shall be confined to full planeload charter operations exclusively. 108 CONG. REC. 12285 (1962).

¹⁵ Transatlantic Charter Investigation, CAB Docket No. 11908, CAB Order No. E-20530 (1964).

¹⁶ 348 F.2d 349 (D.C. Cir. 1965). Note, 32 J. AIR L. & COM. 127 (1966).

¹⁷ Group is the classification given those qualified for chartering under 14 C.F.R. § 207.1(2) (1965) arranged "by a person (no part of whose business is the formation of groups for transportation or the solicitation or sale of transportation services) for the transportation of a group of persons as agent or representative of such group." In regard to overseas charters, the group must have been in existence for six months and not for the purpose of traveling. 14 C.F.R. § 295.2(k) (1965).

of the industry have not been stifled by a predetermined legislative definition of "charter."¹⁸

The supplemental's re-evaluation and re-certification proceedings (prescribed in the 1962 amendment of the act)¹⁹ culminated in 1966,²⁰ and carriers certified thereby were granted, pursuant to the newly formulated Special Regulation 378, the right to engage in "inclusive tour" service. This regulation imposed many restrictions upon both the supplemental carriers and the tour agents including one termed *prior approval*, whereby the tour operator must obtain authorization by the Board to offer the inclusive tour²¹ and must have on file with the Board a resumé of its financial and business qualifications.²² In addition, the tour operator and the supplemental carrier must file: (1) a *tour prospectus*²³ ninety days before departure, describing the number of anticipated passengers, type of plane, itinerary, etc., and (2) a surety bond of double the amount of the charter price.²⁴ Further restrictions were placed on the *conditions and limitations* of inclusive tours, concerning, *inter alia*, minimum price, number of stops, duration of the entire trip, and surface transportation.²⁵ In addition, Special Regulation 378 requires a *post tour report* (within thirty days of the completion of the tour) indicating whether the tour has been consummated and enumerating the deviations, if any, from the previously filed *tour prospectus*.²⁶ Furthermore, a supplemental carrier may neither establish its own tour operator for the purpose of offering an "inclusive tour," nor offer such a tour itself. The Board not only retained the power to change these regulations at any time it determines that the restrictions have become too lax or too stringent, but also limited inclusive tour authority to an experimental period of five years and provided that a review of its effectiveness is to be held at the close of this period.

The focal issue of the instant controversy is whether the CAB's grant of the right to offer inclusive tours allows the supplementals to engage in

¹⁸ *American Airlines, Inc. v. CAB*, 348 F.2d at 354, where the court stated:

We are unable to conclude that the term charter trips has a fixed meaning. . . . We conclude Congress intended, although not without limits, that the Board should be free to evolve a definition in relation to such variable factors as changing needs and changing aircraft. . . . We agree with the Board that the legislative history reveals that a prime concern of Congress was to maintain the integrity of the charter concept—to preserve the distinction between group and individually ticketed travel; within these limits it is for the Board to evolve reasonable definitions. (Emphasis added.)

¹⁹ Public Law 87-528, § 7, 76 Stat. 146 (1962), 49 U.S.C. § 1371, note (1964).

²⁰ Supplemental Air Serv. Proceeding, CAB Docket No. 13795, CAB Order No. E-23350 (11 March 1966).

²¹ CAB Special Regulation, Part 378 (effective 13 May 1966), 31 Fed. Reg. 4779 (1966) [hereinafter CAB Special Regulation].

²² CAB Special Regulation, § 378.12.

²³ CAB Special Regulation, § 378.13.

²⁴ CAB Special Regulation, § 378.16.

²⁵ Sections (1), (2), (3), and (4) of Special Regulation 378.2(b) demand that the tour must be a round trip with a minimum of seven days duration. Each inclusive tour must make a minimum of three stops (not including the point of origin), and these stops must be at least fifty miles apart. The tour price shall include all air and surface transportation between places on the itinerary and transportation to and from the terminal. The tour price charged by the agent for air fare and stopover charges (hotel accommodations, meals, tours) can be no lower than 110% of the lowest available fare offered by the scheduled route carriers for individually ticketed service on the circle route (consisting of the points to be visited on the inclusive tour).

²⁶ CAB Special Regulation, § 378.20(a).

service which is contra to that authorized by section 101(33). Read as a whole, section 101(33) allows supplemental carriers to deal only "in charter trips . . . to supplement the scheduled service [of the regular carriers]. . . ." ²⁷ Prior to Special Regulation 378, the CAB had never permitted United States carriers ²⁸ to engage in inclusive tours, and even though both regular and supplemental carriers may charter, the authorization for "inclusive tours" was granted exclusively to the supplemental carriers. The petitioners contended that "inclusive tour" authority was a mere subterfuge, permitting the supplemental carriers to compete directly with the trunklines in contravention of the congressional intent as evinced by the legislative history of the amending act. ²⁹ In refuting this argument, the court noted that at the time the 1962 amendment was passed, the members of Congress had no concrete information upon which to base their rejection of inclusive tours (aside from the abuses of the ten-flight-per-month rule) because there had never before been a grant of "inclusive tour" authority. In contrast, the court noted that the CAB examiner in the hearings on Special Regulation 378 found that the low price offered for inclusive tours would generate a significant amount of new traffic, and that this would ultimately benefit the entire industry because the additional persons who had been introduced to the convenience of air travel would be more prone to fly in the future. Moreover, the court pointed to the fact that the program is experimental in nature and reserves the power of the Board to make necessary changes to eliminate abuses. It was the court's conclusion that, combined with the restrictions on operation set out in Special Regulation 378, the Board's reserved power is sufficient to keep "inclusive tours" within the definition of "charter trips" and therefore within the scope of the supplementals' limited field. The court noted that recent Defense Department restrictions ³⁰ on carriers receiving government contracts for military carriage demonstrate the impracticality of a strict definition of "charter." The basic concept that only a "group" can charter is satisfied by the fact that the members of the "inclusive tour" will all have a common purpose in vacationing and will travel as a restricted "group" while on the tour. Moreover, the new authority will benefit the supplementals' financial well being while expanding the air transportation industry. The court held, then, that Special Regulation 378 carries out the legislative purposes of (1) stabilizing the

²⁷ See text accompanying note 9 *supra* (text of § 101(33)).

²⁸ European carriers have used inclusive tours extensively in developing the vacation markets of the continent. These tours have usually been limited to locations not served by scheduled service on a regular basis. However, no similar restriction was included in the grant of authority by the CAB. Moreover, the problem of competition is peculiar to United States carriers since most foreign carriers are governmentally owned and there is no conflict with regularly scheduled carriers.

²⁹ See note 14 *supra*, and accompanying text.

³⁰ A restriction has been placed upon the supplementals' military charters by the Department of Defense, which, as of 1 January 1966, demands that all carriers who receive government contracts for military carriage must secure at least 30% of their air transportation revenues from civilian commercial sources. Previously, upwards of 90% of the revenues of some supplementals came from Military Air Transport Service (MATS) contracts. Inclusive tour authority will enable the supplementals that failed to meet the 30% margin to offer additional commercial service so that they will be able to qualify under the new restriction.

operating authority of supplementals so that they can meet the needs of supplemental transportation, (2) maintaining a regulatory scheme in the industry, and (3) protecting the regular carriers from direct competition with the supplementals.

The upholding of "inclusive tour" authority by the court in an example of judicial approval of "agency legislation" in which the agency either distorts or disregards legislative intent. The issue with which the court concerned itself was whether "inclusive tours," as formulated by the Board, are within the definition of "charter trips." The court answered this question in the affirmative, but in so doing, it limited its inquiry to the requirements imposed upon the "inclusive tours" and the experimental nature of the service. Little emphasis was placed on the fact that the controlling statute requires the charter trips to "supplement the scheduled service." In many instances inclusive tours will not fit into the context of the total definition of supplemental air transportation because they will divert, rather than supplement, regular individually ticketed traffic. Because of the duration limitations, few travelers will find it practical to manipulate inclusive tours into point-to-point trips for business purposes, but tours between certain points, especially those that serve popular vacation resorts,³¹ will cause severe diversion from the regular carriers' routes. This diversion constitutes competition—not supplementation, as prescribed by the statute. As a consequence, special restrictions will have to be placed on "inclusive tours" that cause serious diversion in order to make them conform to the demands of the statute. If, as the Board promises,³² adequate measures are taken to curb such abuses, then the entire airline industry may well benefit from inclusive tours. Furthermore, the necessity for supplemental carriers has been proven in many military emergencies,³³ and these emergencies have been met without a disruption of regularly scheduled carrier service. Thus, the "inclusive tour" authority, *if properly controlled*, can be a valuable measure in fulfilling the following demands of this rapidly changing industry: allowing the supplemental carriers to stay abreast in the industry, contributing to the supplementals' financial well being, protecting the regular carriers from unauthorized diversion, and insuring the availability of a fleet of auxiliary air transports for military emergencies.

Eugene G. Sayre

³¹ The regular carriers sought to have the authority limited to the continental United States, thereby excluding Alaska and Hawaii. In *Berry World Travel, Co.*, CAB Order No. E-24473 (2 December 1966), *Berry and World Airways, Inc.* were authorized to conduct forty-nine "inclusive tours" to the state of Hawaii. The total cost of these tours is advertised, in magazines of national distribution, as being "less than first class jet fare alone." The format of the advertising indicates that inclusive tours are competing with the regular carriers.

³² The Board promised, in granting the "inclusive tour" authority, to use its retained powers to halt any abuse of the new program, *Large Irregular Air Carrier Investigation*, 22 C.A.B. 838 (1955), authorizing the ten-trip-per-month provision, stated that the Board foresaw no reasonable chance for abuses but if there were it would use its rule making power to stop them. However, when the pooling abuse arose, the Board did not take sufficient action to stop it and, as a result, Congress had to enact the 1962 amendment to the Federal Aviation Act of 1958. Public Law 87-528, 76 Stat. 143 (1962), amending various sections of the act.

³³ Examples of which are the huge amounts of material moved during the Berlin Airlift, and the speedy transport of priority material to Korea in the early fifties and to Viet Nam today.

Government Liability — Air Traffic Controllers — Duty of Care

Plaintiff, executrix of the estate of a passenger who was killed in the crash of Eastern Air Lines' Flight 512, instituted an action against both Eastern and the United States.¹ The plane crashed during an attempted landing at Idlewild [now Kennedy] International Airport, New York. Visibility was poor due to ground fog. Given the existing weather conditions, Eastern's Flight Manual provided that upon reaching a point one-half mile from the end of the runway and two-hundred feet above the ground, a pilot must have had visual reference to the runway before being authorized to descend farther. The pilot did not have, or lost, visual reference to the runway while descending, attempting to execute a missed approach,² apparently failed to follow Eastern's prescribed regulations for missed approaches, and crashed six hundred and ten feet to the left of the runway center line and approximately half-way down the runway. No weather reports were transmitted to the plane between 9:33 p.m. and 9:45 p.m., the time of the crash. Moreover, the visibility was transmitted erroneously as one mile at 9:33 p.m. even though the controlling visibility from the tower had actually decreased to three-quarters of a mile. *Held*: The accident was due to the concurrent negligence of Eastern Air Lines and the United States. The federal government was liable for the negligent omission of its air traffic control [hereinafter ATC] operator³ in failing to relay any weather information to the pilot during the twelve minute period immediately preceeding the crash. Eastern was found negligent because, *inter alia*, the airline crew did not exercise due care when they failed to execute a missed approach in conformity with the rules laid down by their own company. *Ingham v. Eastern Air Lines, Inc.*, 3 Av. L. REP. (9 Av. Cas.) ¶ 18,170 (E.D.N.Y. 1966).

It is the generally accepted rule that the federal government is liable for the negligence of control tower operators because their duties do not fall within the discretionary exclusion of the Federal Tort Claims Act.⁴

¹ Plaintiff seeks to reach the United States through the Federal Tort Claims Act, 62 Stat. 982 (1946), 28 U.S.C. § 2671 (1964), which allows suits to be brought against the United States for the negligence of federal employees.

² A procedure employed by pilots to discontinue descent. It involves the "pulling-up" of the plane in order to make another attempt at landing if deemed feasible. The procedure is regulated by explicit instructions.

³ 62 Stat. 933 (1946), 28 U.S.C. § 1346(b) (1964), gives district courts exclusive jurisdiction of civil actions on claims against the United States arising out of the negligence of any employee of the Government while acting within the scope of his office or employment.

⁴ 62 Stat. 984 (1946), 28 U.S.C. § 2680(a) (1964):

The provisions of this chapter and section 1346(b) of this title shall not apply to—
any claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

The leading case on this point is *Eastern Air Lines, Inc. v. Union Trust Co.*⁵ in which the Government argued that "tower operators' duties are public in nature and involve the exercise of discretion and judgment," with the result that neither the operators nor the United States should be held liable for their negligence. The court in response held that "tower operators merely handle operational details which are outside the area of the discretionary functions and duties referred to in § 2680(a); and that, consequently, the Tort Claims Act permits the Government to be sued for damages sustained because of their negligence."⁶

The primary question, then, in determining the liability of the Government in this situation is one of determining the extent to which tower control must go in the exercise of due care to assist pilots and, thus, to guard against aircraft accidents. The Air Traffic Control Procedures Manual sets out the responsibilities of and the procedures to be followed by ATC:

Provide airport traffic control service based only upon observed or known traffic and airport conditions which might, in your judgment, constitute a hazard. These include parachutists within control zones, vehicular traffic, large flocks of birds in the vicinity of the airport, and temporary obstructions on or near the airport.⁷

Despite the fact that air traffic control regulations specifically require the relaying of weather information by tower operators to approaching planes, the precise issue of Air Traffic Control's failure to transmit weather conditions had not previously reached the courts. The applicable regulations state:

At locations where official weather reports are obtained by the controller through routine procedures and the ceiling and/or visibility is reported as being at or below the highest "circling minima" established for the airport concerned, a report of current weather conditions, and subsequent changes, as necessary, shall be transmitted as follows:

* * *

B. By approach control facilities, to all aircraft at the time of the first radio contact or as soon as possible, thereafter.⁸

The regulations also provide that "pertinent information relative to known field conditions shall be furnished to pilots whenever, in the controllers' judgment, it may be necessary to the safe operation of the aircraft concerned."⁹ The FAA Communications Manual requires controllers to "announce remarks"¹⁰ included in weather reports of interest to pilots.¹¹

⁵ *Eastern Air Lines, Inc. v. Union Trust Co.*, 221 F.2d 62 (D.C. Cir.), *aff'd mem. sub nom. United States v. Union Trust Co.*, 350 U.S. 907 (1956).

⁶ *Id.* at 75.

⁷ Air Traffic Control Procedures Manual § 410.1 (March 1966).

⁸ Brief for Plaintiff, p. 71a, n.127 (quoting Air Traffic Control Procedures Manual § 265.2), *Ingham v. Eastern Air Lines, Inc.*, 3 Av. L. REP. (9 Av. Cas.) ¶ 18,170 (E.D.N.Y. 1966).

⁹ *Id.* at 71a, n.127(b) (quoting Air Traffic Control Procedures Manual § 342.5), *Ingham v. Eastern Air Lines, Inc.*, 3 Av. L. REP. (9 Av. Cas.) ¶ 18,170 (E.D.N.Y. 1966).

¹⁰ The "remarks" section of a weather report contains information about the weather obtained from a source other than that which is currently being reported as official and controlling.

¹¹ Brief for Plaintiff, p. 72 n.129 (quoting Federal Aviation Agency Communication Manual § 2318, p. 40), *Ingham v. Eastern Air Lines, Inc.*, 3 Av. L. REP. (9 Av. Cas.) ¶ 18,170 (E.D.N.Y. 1966).

These regulations provide a broad framework within which the tower operator functions, apparently leaving wide latitude for decisions as to a proper method for carrying out these instructions.

Although the most apparent test available to establish a duty on the controller outside the ATC Procedures Manual, (the standard "reasonable man" test of negligence) has not been freely applied by the courts, the "Good Samaritan" doctrine, enunciated in *Fair v. United States*,¹² is also seemingly applicable in determining the proper scope of the tower operator's duties.¹³ In propounding this doctrine, the *Fair* court declared, "if the Government undertakes to perform certain acts or functions thus engendering reliance thereon, it must then perform them with due care; that obligation of due care extends to the public and the individuals who compose it; the Government is liable for the actions of its employees dealing directly with the public in the application of established policies. . . ."¹⁴ [Emphasis added.] Thus, once ATC undertakes a practice (such as transmitting weather information) and reliance is engendered thereupon, the control tower operator has a duty to continue that practice and to exercise due care in so doing.

Notwithstanding the fact that the Government is liable for the negligence of control tower operators, there is a paucity of cases actually finding the operators negligent. This circumstance results from the fact that courts were originally reluctant to impose extensive affirmative duties on ATC. The United States courts began with the premise that the relevant government regulations place the primary responsibility for the operation of aircraft with the pilot and not with the tower operator.¹⁵ For example, in a 1955 case, *Smerdon v. United States*,¹⁶ the control tower at Boston International could not give a ground-controlled approach because weather conditions had obscured the instruments on the ground. After having been informed of this circumstance, the pilot overheard the control tower transmitting visibility information about another airport. Mistakenly believing this information to apply to the Boston airport, and professing a supposed ability to see the airport from his position, the pilot requested the control center to give him clearance for a Visual Flight Rules (VFR)¹⁷ landing even though he had been told visibility conditions did not permit this type of landing. Control center granted clearance to land, and the plane subsequently crashed. The plaintiff's theory of liability was that the control tower operator had a duty to assist the pilot and his passengers by providing advice and information for a safe landing. The plaintiff

¹² *Fair v. United States*, 234 F.2d 288 (5th Cir. 1956).

¹³ See Eastman, *Liability of the Ground Control Operator for Negligence*, 17 J. AIR L. & COM. 170, 175-79, for a discussion of the reliance theory as a basis for assessing air traffic control liability.

¹⁴ *Fair v. United States*, 234 F.2d at 294.

¹⁵ *United States v. Schulteus*, 277 F.2d 322, 328 (5th Cir. 1960).

¹⁶ 135 F. Supp. 929 (D. Mass. 1955).

¹⁷ Visual Flight Rules are those regulations followed by pilots when visual reference to the airfield and runway can be had by the pilot without the necessity of being controlled by ground instruments. An Instrument Landing System (ILS) descent is one in which the plane is guided and the pilot directed in his landing almost exclusively by instruments with little pilot control being present.

charged that the tower operator breached this alleged duty by authorizing a VFR landing where visibility was prohibitive. As the pilot had been fully warned of weather conditions, the court absolved the tower from all liability. Moreover, the court went so far as to enunciate by way of dictum a general principle that operators' duties are limited to maintaining control of the airways to prevent collisions between aircraft within the control area and to prevent danger arising from obstacles on the movement area.¹⁸

Two relatively recent federal district court cases have faced the problem of ATC liability. In *Furumizo v. United States*,¹⁹ the Hawaii federal district court clearly failed to follow the *Smerdon* premise that ATC's duties are limited to the prevention of collisions. The problem in the *Furumizo* case involved the degree of assistance required to be given the pilot by the tower operator. The control tower gave a student flyer clearance to take-off, along with a standard phrase to "watch for turbulence." The student attempted to take-off and crashed in the wake of turbulence caused by the immediately preceding departure of a DC-8. The court found the tower operator negligent for a failure to exercise his reasonable judgment to avoid an obvious danger created by air turbulence; the standard warning was not sufficient under these circumstances. Instead of following a "slavish" interpretation of the regulations, the court found that the operator had a duty to go beyond the letter of the regulations in fulfilling a responsibility to prevent the crash.²⁰ However, when confronted with a fact situation very similar to that of *Furumizo*, a Georgia federal district court in *Hartz v. United States*²¹ held that the control tower operator did not have a common law duty to the pilot independent of the duty created by the Air Traffic Control Procedures Manual, and that the Procedures Manual governed the measure of any duty owed by Air Traffic Control.

As both the *Furumizo* and the *Hartz* decisions are 1965 district court cases which have not been decided on appeal, it is difficult to unequivocally state the law as it presently stands. The law as enunciated by *Furumizo* had apparently progressed to the point of including within the duties of tower operators any reasonable action which could prevent accidents. In contrast, the *Hartz* court concluded that the question is not one of reasonableness but, rather, whether the ATC operator has acted in accordance with prescribed procedure, *i.e.*, whether he has followed the letter of the regulations. Moreover, although *Smerdon* has not

¹⁸ *Smerdon v. United States*, 135 F. Supp. 929, 932 (D. Mass. 1955).

¹⁹ 245 F. Supp. 981 (D. Hawaii 1965).

²⁰ *Id.* at 992.

²¹ 249 F. Supp. 119, 123-24 (N.D. Ga. 1965). *Hartz* is perhaps distinguishable from *Furumizo* in that the Georgia legislature had adopted federal aviation practices and procedures as its own, and that the pilot was very experienced. Nevertheless, the approach of the Georgia court is one which is appreciably different from the approach of the court in *Furumizo*. The *Hartz* court is of the opinion that federal legislation had pre-empted the field of regulating civil air traffic and, because of this pre-emption, state law could not impose a duty on air traffic control where federal regulations have not done so. In finding that an exact adherence to regulations, without more, was all that the controller needed do, the *Hartz* opinion follows the *Smerdon* approach more closely.

been expressly overruled, the *Furumizo* court stated that the dicta in *Smerdon* was such that the court, in limiting the controllers' duties to the prevention of collisions with other airplanes or obstacles within the control area, could not have possibly taken into consideration the scope of the regulations controlling tower operators.²² The obvious answer to the conflict between *Furumizo* and *Smerdon* over the ATC's duty under the regulations is that the technological competence and capabilities of air traffic control have increased so vastly since 1955 (*Smerdon*) that the courts have recognized that tower control should bear much more of the responsibility for insuring safe flights and should be liable for failure to fulfill that responsibility. *Hartz* apparently recognized a similar increase in tower control responsibility but would follow *Smerdon* to the extent of limiting this responsibility to actions falling within a strict interpretation of the regulations.

If the *Furumizo* extension of tower control's duties to the exercise of "reasonable care" is in fact the law, the instant case represents little more, as far as the concept of duty is concerned, than a perfunctory determination that a reasonable tower operator would have continued weather reports in this situation. Tower control failed to report any information to Flight 512 during a period of twelve minutes. The court held that the operator had a duty to report the fact that ground visibility had gone below one-half mile, despite the fact that tower rather than surface visibility was controlling at the time. This information would have been reported as "remarks," which, according to the regulations, are to be reported "whenever, in the controller's judgment, it may be necessary to the safe operation of the aircraft concerned." The FAA Communications Manual provides that controllers should "announce remarks included in weather reports of interest to pilots." Upon application of the *Furumizo* reasonable man test to the instant fact situation, it is clear that the tower operator had a duty to exercise reasonable care even though the regulations do not literally require continuous reports, and seemingly leave it up to the operator to decide when to issue remarks. On the other hand, if the *Hartz* holding were applied to these same facts, a different result would apparently be reached because the regulations do not impose an explicit duty. However, should the *Hartz* rule be considered the law so that reasonableness is not the measure of duty, the plaintiff might still avail himself of the "Good Samaritan" doctrine in order to establish a duty, since pilots certainly seem to rely upon the expectation that factually correct weather reports will be given with reasonable dispatch.

Even if it is conceded that tower control breached its duty of care in the instant case, fault can still easily be found with the court's superficial treatment of causation between the negligent failure to issue weather bulletins and the accident. The crew of Flight 512 was aware of the deteriorating weather conditions at the airport as a result of their required

²² *Furumizo v. United States*, 245 F. Supp. 981 (D. Hawaii 1965).

monitoring of the various Air Traffic Control frequencies.²³ Moreover, the pilot had to "hold" for twenty-six minutes before he was told to contact approach control for clearance. Therefore, the crew of Flight 512 was not descending into weather conditions of which they were totally unaware. In view of these circumstances, the pilot's negligent execution of a missed approach apparently raises the issue of intervening cause. An intervening cause is one which operates to produce an injury after the original negligence. If the original actor could not have foreseen the intervening force at the time of his action, the intervening force becomes the cause of the injury, and the original actor is relieved from liability.²⁴ It might appear foreseeable that the pilot would attempt to land if he erroneously assumed that visibility was still at one mile as reported.²⁵ However, it would not appear to have been foreseeable that the airline crew would negligently attempt a missed approach,²⁶ a normal occurrence in the airline industry for which pilots are continuously trained. Nine other aircraft executed approaches ahead of Flight 512. One of the flights preceded 512 by one minute, having landed on the same runway. Thus, whether a breach of duty on the part of tower control was actually the "proximate cause" of the accident seems open to doubt. Nevertheless the court, sitting without a jury, found that there was a sufficient causation link to hold the Government concurrently liable, and deference for the fact-finder's function gives one pause who would be tempted to suggest that the wrong result was reached.

The tower control operators perform in an area in which human error cannot be tolerated, but since these operators are human, a paradox is presented. There is possibly a need for complete revision of the basic tenet that the primary responsibility for the operation of airplanes is on the shoulders of the pilot. The better practice might be to give the responsibility to air traffic control with instruments carrying the major portion of the burden. This is arguable. Although pilots would seem to know best their capabilities and those of their planes to perform in a given situation, technological improvements have increased the realm of functions performed by ATC and have correspondingly decreased the degree of actual control that the pilot retains over his plane. At any rate, if the system of primary responsibility is to change, one can certainly question the competence of the courts to determine the extent of the duties of air traffic control in the regulation of air traffic. With all due regard for the need for air safety, the position of the tower operators

²³ The Eastern Air Lines dispatch at 8:22 p.m. advised the flight that it might be necessary to divert to Philadelphia because of weather, and the crew was informed at 9:02 p.m. that another Eastern flight had missed an approach. At 8:57 p.m. the pilot was advised "delay indefinite due to weather" and at 9:03 p.m. this advice was repeated.

²⁴ See *Saugerties Bank v. Delaware & Hudson Co.*, 236 N.Y. 425, 141 N.E. 904, 905 (1923).

²⁵ Tower visibility was controlling and was at three-fourths of a mile when the crash occurred. Ground visibility was below one-half mile.

²⁶ Eastern's pilot, called by the plaintiff, testified that his plane was fully capable of executing a missed approach at any altitude down to twenty-five feet. Moreover, Eastern's counsel conceded that it was possible to make a missed approach from fifty feet. *Ingham v. Eastern Air Lines, Inc.*, 3 Av. L. REP. (9 Av. Cas.) at ¶ 18,172.

must not be overlooked. From their viewpoint, there is a need for guidelines within which tower control should expect to function and beyond which the controllers need not go unless confronted with very exceptional circumstances. A rather frustrating situation arises when one thinks he has done all that was required of him, only to be confronted with a decision in which the court, with hindsight, declares that his duties extended beyond that which he had presumed. Perhaps the answer is a legislative pronouncement, initiated by a study conducted by the Federal Aviation Agency, delineating the extent of tower control's duties. Certainly the FAA would be glad to take an opportunity to get away from the recent *ad hoc* decisions, even if it means admitting that there are numerous circumstances in which the Government should be held liable for breach of a required duty.

Joan T. Winn

CAB — Exemption Policy and Procedure — Hawaiian Inter-island Carriers

Island Airlines [hereinafter Island] operates wholly within the State of Hawaii; its flights are intra-island and inter-island, and do not extend to any body of land other than the islands of the Hawaiian archipelago. While such operations might be considered purely intra-state in nature, they lose that quality because the distance between any two of the several islands of the Hawaiian chain is greater than six miles (twice the three-mile territorial limit of the two islands), so that inter-island flights extend over federal waters. Thus, any inter-island flight by Island necessarily traverses airspace that is not within the aegis of the State of Hawaii. It was against this backdrop that the Ninth Circuit held in the first *Island* case¹ that Island was operating in interstate transport and as such was subject to the jurisdiction of the Civil Aeronautics Board.² Unwilling to operate as a federally regulated carrier, Island attempted to evade CAB jurisdiction by requesting the Board to grant it an exemption from the need for CAB certification. Answers were filed in opposition by Hawaiian Airlines and Aloha Airlines, the inter-island carriers that provide air service under CAB certification. Island failed to respond; neither did it request a hearing on the petition for exemption. In October 1965 the CAB issued an order that denied Island's request for exemption. Island appealed, arguing, *inter alia*, that the CAB's decision was an abuse of discretion (arbitrary and capricious) and legally erroneous in view of the purposes of the Federal Aviation Act and the facts of the record. *Held*: The CAB did not act capriciously in denying Island's request for exemption. Moreover, the question whether the CAB committed any statutory or constitutional procedural error was precluded by Island's failure to request a hearing on the exemption petition or to raise any allegations of error before the CAB. *Island Airlines, Inc. v. CAB*, 363 F.2d 120 (9th Cir. 1966).

¹ The interstate character of Island's operations was determined in *Island Airlines, Inc. v. CAB*, 352 F.2d 735 (9th Cir. 1965). The controversy materialized in 1964, when the CAB obtained a permanent injunction from the federal district court for Hawaii enjoining Island from continuing its inter-island operations without being certified by the CAB as required by the Federal Aviation Act of 1958, § 401, 72 Stat. 754, 49 U.S.C. § 1371 (1964). Island appealed and the case was remanded to determine whether the channels between the several islands were within the boundaries of the state. *Island Airlines, Inc. v. CAB*, 331 F.2d 207 (9th Cir. 1964). On finding that the parts of the inter-island channels that were beyond the three-mile limits of any two islands were not within the State of Hawaii, the district court decided that any flights over such extra-Hawaiian airspace were interstate and, thus, subject to the CAB's jurisdiction. The district court then reinstated the permanent injunction against Island's inter-island operations. 235 F. Supp. 990 (D. Hawaii 1964). Island appealed and the Ninth Circuit Court of Appeals again affirmed. *Island Airlines, Inc. v. CAB*, 352 F.2d 735 (9th Cir. 1965).

² Federal Aviation Act of 1958, § 101(21)(a), 72 Stat. 737, as amended, 49 U.S.C. § 1301 (1964).

Section 401(a) of the Federal Aviation Act of 1958 provides:

No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation.³

However, under section 416(b)(1) of the same act, the CAB is empowered to:

exempt from the requirements of this title [IV] . . . any air carrier . . . if it finds that the enforcement of this title . . . would be an undue burden on such air carrier . . . by reason of the limited extent of, or unusual circumstances affecting, the operations of such air carrier . . . and is not in the public interest⁴

Thus, while each air carrier subject to the CAB's jurisdiction must be certified, the CAB can exempt a carrier under circumstances in which the certification requirement would be an "undue burden" and not "in the public interest." It is to be noted that certification and exemption are not "merely two alternative provisions by which the Board can authorize operation,"⁵ and that

Congress did not intend that the Board might, by the use of the exemption provisions of Section 416(b), destroy the elaborate basic requirements of the Act for a certificated system of airplane carriage⁶

Island's primary contention in the earlier case,⁷ and one which was reiterated in the instant case, was that it was not required to obtain certification under section 401(a) because its operations did not fall within CAB jurisdiction. It alleged that since all states besides Hawaii can control intrastate air transportation and Hawaii is precluded from doing so solely because of a geographical anomaly, Hawaii will be denied "equal footing" in the federal union unless the CAB relinquishes control of intrastate flights to the state. However, the Senate, when it considered the Hawaii Statehood Bill,⁸ clearly indicated that the CAB was to have jurisdiction:

Hawaii presents a unique situation with respect to the impact of statehood on the Federal regulation of air transportation between the main islands. This is because of the geographical structure of the Territory Hence, most, if not all, of the interisland air transportation passes through airspace not a part of the Territory. Under the . . . Federal Aviation Act . . . the Civil Aeronautics Board exercises economic regulatory jurisdiction over carriers engaged in interstate air transportation . . . between places in the same State through the airspace over any place outside thereof. Consequently . . . interisland air transportation will remain subject to the . . . Federal Aviation Act . . . because that transportation . . . while between places in the same State, will pass through airspace outside the State. . . . The committee . . . believes the application of the . . . Federal Aviation Act . . . to the State of Hawaii should continue in accordance with the definition of interstate air transportation as contained in that act.⁹

³ 72 Stat. 754, 49 U.S.C. § 1371 (1964).

⁴ 72 Stat. 771, 49 U.S.C. § 1386 (1964).

⁵ *American Airlines, Inc. v. CAB*, 231 F.2d 483, 488 (D.C. Cir. 1956).

⁶ *American Airlines, Inc. v. CAB*, 235 F.2d 845, 850 (D.C. Cir. 1956).

⁷ See note 1, *supra*.

⁸ S. REP. No. 80, 86th Cong., 1st Sess. (1959).

⁹ S. REP. No. 80, 86th Cong., 1st Sess. 3-4 (1959).

And, in the earlier *Island* case,¹⁰ the Ninth Circuit Court of Appeals affirmed the district court's findings that federal waters separated each of the major Hawaiian islands from its nearest neighbor-island, that the legislative history fully supported the CAB's jurisdiction, and that the inter-island operations of the carrier were "not of purely local . . . concern."¹¹

With these factors confirming the appropriateness of federal regulation in the absence of an exemption, and in view of the "undue burden-unusual circumstances-public interest" requirements for exemption, *Island's* main line of attack in the instant case was that the CAB erred in not granting *Island* the requested exemption from certification. However, the Court of Appeals for the Ninth Circuit made it clear that the exemption process is to be used "sparingly,"¹² a precept that was established in *American Airlines, Inc. v. CAB*.¹³ With the exception of the misuse of the exemption power in *American Airlines*, the CAB has been rather conservative in invoking this statutory power. In its consideration of exemption petitions in recent years, the Board has delineated certain factors that will determine whether an exemption will be granted. The principle considerations are: (1) the experimental character of the service;¹⁴ (2) the temporary or sporadic character of the service;¹⁵ (3) the existence of an immediate, unfilled public need for service when a certificate proceeding would interfere with timely implementation of the service;¹⁶ and (4) a need for adaptability of the service to changing needs, such that a certificate proceeding to accommodate each change would be awkward and burdensome.¹⁷ Of course, the Board usually considers the effect, if any, exempted service will have upon certified carriers serving the same routes. *Island's* case did not involve any of the usual "exemption" factors, and the carrier failed to present any factual or economic material to indicate why the requested exemption would be in the public interest.¹⁸

In addition to granting exemptions on the basis of certain specific

¹⁰ *Island Airlines, Inc. v. CAB*, 352 F.2d 735 (9th Cir. 1965).

¹¹ *CAB v. Island Airlines, Inc.*, 235 F. Supp. 990, 1010 (D. Hawaii 1964).

¹² *Island Airlines, Inc. v. CAB*, 363 F.2d 120, 125 (9th Cir. 1966).

¹³ *American Airlines, Inc. v. CAB*, 235 F.2d 845 (D.C. Cir. 1956). This principle was established when the CAB's exemption grants to several carriers were held invalid by the court. And when the CAB attempted to issue the same carriers certificates of public convenience and necessity, the court held this action likewise invalid as being beyond the Board's authority. *United Air Lines, Inc. v. CAB*, 279 F.2d 446 (D.C. Cir. 1960). That the Board's activities were without authority was affirmed in the Conference Report that accompanied the bill designed to enable the CAB to issue certificates to carriers for "supplemental air transportation." The Report noted that the Board had exceeded its "proper use of the exemption authority" and that the exemption power should be construed narrowly and employed in only very limited and unusual circumstances. H.R. REP. NO. 1950, 87th Cong., 2d Sess. 3 (1962).

¹⁴ *Surface-Mail-by-Air Exemption*, 20 C.A.B. 658 (1955), *aff'd*, *American Airlines, Inc. v. CAB*, 231 F.2d 483 (1956).

¹⁵ *Application of Starflite, Inc.*, CAB Docket No. 11463, CAB Order No. E-21535 (1964); *Lake Central, North Central, St. Joseph Benton Harbor Exemption*, 30 C.A.B. 1542 (1959); and *United Air Lines, Inc., Exemption*, 25 C.A.B. 782 (1957).

¹⁶ *Mackey Airlines Exemption*, 26 C.A.B. 709 (1957); and *Mohawk Air, Ogdenburg Exemption*, 25 C.A.B. 766 (1957).

¹⁷ *Service to Santa Catalina Island*, 30 C.A.B. 1060, 1077 (1960); and *Los Angeles Airways Certificate Renewal*, 14 C.A.B. 284, 288 (1951).

¹⁸ 14 C.F.R. § 302.402(b) & (c) (1965).

factors, the CAB has also granted "blanket" exemptions when it felt they were required. At one time it granted a blanket exemption to certain non-scheduled, large aircraft services because of their "irregular and specialized" character.¹⁹ It presently allows a blanket exemption for certain "air taxi" carriers, because of the unique character of the air taxi situation.²⁰

Of all the exemption cases, the one that bears the closest resemblance to the *Island* situation is *Application of Starflite, Inc.*²¹ There, the applicant flew a Long Island-La Guardia route, a wholly intrastate operation governed by the state's visual flight rules. Starflite desired to fly under instrument flight rules (to enable it to fly in bad weather), and to do so it had to fly outside New York State, so that its bad weather flights became interstate in nature. In deciding to grant an exemption from certification to Starflight, the CAB stated:

The authority sought is extremely limited Grant of exemption will not permit the carrier to expand geographic areas it may already serve on intrastate operations; it will, however, enable the carrier to use alternate IFR routings when VFR operations are not permissible. Under the circumstances, we find that grant of the exemption sought is in the public interest To require a certification proceeding in order to conduct the proposed operations would be disproportionate to the size of the operations, unduly burdensome on the carrier, and not in the public interest.²²

Starflight involved several factors that were congruent with factors in the *Island* situation: (1) in both cases, the flights were solely between places in the same state; (2) in both cases, the flights occurred over airspace outside of the state; (3) in both cases, the carrier's service was of limited extent; and (4) in both cases, the burden of certification was alleged to be unduly burdensome and not in the public interest. There were, however, distinguishing points, albeit they were of minor import: (1) Starflight had to fly outside the state because of weather conditions, whereas *Island* had to fly outside the state because of geographical conditions; and (2) Starflite's extrastate operations were infrequent and sporadic, while *Island*'s were part of a regular schedule. Given these similarities and minor points of distinction, the *Starflite* case, on its face at least, does not seem distinguishable from *Island*; that is, there seems to be no valid reason for granting an exemption in one case and not in the other.

However, one further distinction between the cases is crucial. In *Starflite*, there was no necessity for considering the effect of Starflite's interstate operations upon other carriers. It was determined that allowing Starflite to traverse interstate airspace in order to fly IFR would have "no significant adverse effect upon any other air carrier";²³ on the other hand, allowing *Island* to do so would probably have a deleterious effect upon the other two CAB-certified Hawaiian carriers, Hawaiian and Aloha. In

¹⁹ 14 Fed. Reg. 3546 (1949).

²⁰ 14 C.F.R. § 298 (1965) (for aircraft with less than 12,500 pounds of gross take-off weight).

²¹ CAB Docket No. 11463, CAB Order No. E-21535 (1964). See also Catalina Island Serv. Investigation, CAB Docket No. 13101, CAB Order No. E-19678 (13 June 1963).

²² Application of Starflite, Inc., CAB Docket No. 11463, CAB Order No. E-21535 (1964).

²³ *Ibid.*

fact, one of the CAB's primary reasons for denying Island's request for the exemption was the potential impact of Island's non-regulated service on Hawaiian and Aloha:

Aloha estimates that Island's proposed service would divert \$1,000,000 annual revenue from Aloha, and Hawaiian estimates that the two subsidized carriers would lose an additional \$4,856,000 annually as a result of Island's service. These diversion estimates are based on Island's service alone, while the application presents the possibility of an even greater number of additional carriers in the market. Under the circumstances, it would not be in the public interest to grant exemption authority permitting a carrier or carriers to operate in direct competition with Aloha and Hawaiian.²⁴

If Island's service were to cause such a diversion of income from Aloha and Hawaiian, the federal subsidy (6.4 million dollars in the years 1949-1965) would probably have to be increased. Because of the potential effect of such subsidy increases upon the United States Treasury, the CAB has always felt it essential to consider the economic impact that certification or exemption will have upon other certified carriers.²⁵ And regardless of whether certification or exemption causes losses sufficiently large to effect the Treasury, the economic injury to a competing carrier is usually a determinative factor in itself.

In this regard, it is interesting to note that the CAB has begun "several studies of particular air travel markets, selected because they have been commanding attention by changing fares and burgeoning growth of passenger traffic."²⁶ This study relates the Horatio Alger story of Pacific Southwest Airline's competitive struggle on the Los Angeles-San Francisco route against United, Trans-World, and Western.²⁷ The staff study, covering the period 1957-1964, indicates that: (1) "In (the) annual figures, PSA's rise has been uninterrupted, and picked up rapidly after 1961";²⁸ (2) "With lower fares, PSA forged ahead in volume of traffic," but the trunk lines' "determined competition . . . has brought them, together, equal with PSA in number of coach passengers";²⁹ (3) "PSA has appealed, successfully, to the large potential market—people who formerly traveled by other modes or did not travel at all" (*i.e.*, weekend-personal travel passengers vis-à-vis weekday-business travel passengers);³⁰ and (4) other factors contributed to PSA's success, *e.g.*, its determined undercutting of

²⁴ Application of Island Airlines, Inc., CAB Docket No. 16189, CAB Order No. E-22758 (11 Oct. 1965).

²⁵ Hawaiian Intraterritorial Serv., 10 C.A.B. 62, 65-66 (1948); Florida Case, 6 C.A.B. 765, 774 (1946); and Mid-Continent Air, Twin-Cities-St. Louis Operations, 2 C.A.B. 63, 93 (1940). In this regard, see a valuable article by Silberman, *Price Discrimination and the Regulation of Air Transportation*, 31 J. AIR L. & COM. 198 (1965). Of special interest are pp. 200-01, 207, 213-14, 223, 233, 236, 237, 239, 250, and 260.

²⁶ 4 CAB STAFF RESEARCH REP., TRAFFIC, FARES, AND COMPETITION: LOS ANGELES-SAN FRANCISCO AIR TRAVEL CORRIDOR 3 (1965) [hereinafter STAFF RESEARCH REP. No. 4].

²⁷ See Note, 32 J. AIR L. & COM. 607, 615 (1966), which concludes, after discussing STAFF REPORT No. 4, that market conditions may be such that

[V]igorous competition on *major* routes can substantially improve service and that limited-market carriers are well qualified to guarantee that such competition takes place. (Emphasis added.)

²⁸ STAFF RESEARCH REP. No. 4 at 7.

²⁹ *Id.* at 9.

³⁰ *Id.* at 11.

fares, keeping its equipment competitive, and introduction of superior equipment.³¹ As a result of several factors, not the least of which was the competition offered by PSA, traffic increased and average fares fell,³² and the report predicted "continued sharp competition . . . to bring down fare levels still more, to expand traffic, and to improve equipment and service."³³

Although a carrier is not required to seek a hearing on its exemption request, it is authorized to do so,³⁴ and it would have been to Island's advantage to have asked for one. The Board, however, does require that the applicant "state in detail the facts" supporting its request for exemption³⁵ and that the application be accompanied by a "statement of economic data or other matters which the applicant desires the Board to officially notice. . . ."³⁶ Of course, a study similar to PSA's, emphasizing market elasticity, would have been useful to Island in presenting its argument at a hearing on the exemption. The strength of such an argument would depend on how well Island established the similarities between the Hawaiian inter-island air traffic situation and the Los Angeles-San Francisco market.³⁷ Assuming that the similarity could be established, Island could use the report to demonstrate that the presence of a non-regulated carrier in the market could improve the quality and quantity of service, and thus that the exemption should be granted notwithstanding any possible detrimental effect upon the two certified carriers. However, regardless of the procedural errors or omissions committed by Island, and despite the fact that the staff study would have had some relevance to Island's case, the CAB could have deemed the study inapplicable to the Hawaiian inter-island situation because several distinguishing points make the Los Angeles-San Francisco market unique, *e.g.*, (1) "Los Angeles-San Francisco is the heaviest traveled of all city-pair markets in the world";³⁸ (2) the growth of this city-pair is marked: (a) population in California increased 27% in the period studied (compared to a national growth rate of 12%), and (b) incomes, already one-fourth higher than the national average, grow at least as fast, if not faster, than the national average;³⁹ (3) the great advantage of air travel over motor travel in the market area (one-hour flying time);⁴⁰ and (4) the fact that declines of average fares "bring more-than-proportional increases of traffic."⁴¹ (All these factors indicating elasticity in the California market are perhaps offset to some degree by the fact that 70% of the market consists of business travel—a highly inelastic clientele.) In addition to these differences, the study itself clearly

³¹ *Id.* at 13, 15.

³² *Id.* at 10.

³³ *Id.* at 19.

³⁴ 14 C.F.R. § 302.408 (1965). See *Island Airlines, Inc. v. CAB*, 363 F.2d at 124.

³⁵ 14 C.F.R. § 302.402(b) (1965).

³⁶ 14 C.F.R. § 302.402(c) (1965).

³⁷ The fact that the PSA study involved an intrastate carrier and Island applied for an exemption would not, in the Author's opinion, destroy the value of the study to Island.

³⁸ STAFF RESEARCH REP. NO. 4 at 5.

³⁹ *Ibid.*

⁴⁰ *Id.* at 7.

⁴¹ *Id.* at 21.

states that "the contents of the report are the responsibility of this staff and do not necessarily reflect official views or opinions of the Board Members themselves."⁴² Notwithstanding this disclaimer, the staff study of the Los Angeles-San Francisco market is significant, perhaps not so much for Island specifically, but as being indicative of the CAB's continuing concern with the competitive impact an exempted carrier will have on certificated carriers.

The courts, too, have evinced such a concern. In *American Airlines v. CAB*,⁴³ the court felt it could approve the exemption granted, but only if the CAB assured it that the "proposed supplemental service would not result in adverse economic effects upon the certificated system"; it felt such assurance was "required by the general scheme of the statute."⁴⁴ Since Hawaiian and Aloha had been required to obtain certificates of public convenience and necessity, and because it felt certification (hence, regulation) was preferable to exemption, the CAB could not find a reason to justify Island's escaping the certification requirement.

As for Island's claim that the CAB had committed procedural irregularities, the court replied that Island had been its own worst enemy,⁴⁵ e.g., (1) it presented arguments already refuted in the earlier *Island* decision;⁴⁶ (2) it failed to present estimates of its own to refute the diversion estimates of Hawaiian and Aloha;⁴⁷ and (3) it did not request a Board hearing on its exemption petition; neither did it file a petition for rehearing.⁴⁸ Nor could the court find any fault with the CAB's procedural actions in the case. It felt that the Board had acted in accordance with the prescribed rules⁴⁹ and, more importantly, that Island's failure to raise allegations of error before the CAB precluded the court from considering these allegations.⁵⁰

It appears that the main reason for Island's unsuccessful bid for exemption was simply its failure to present its argument to the CAB first instead of voicing its initial protest in the Ninth Circuit. It is submitted that if Island had presented its case to the Board in a timely, sufficient, and complete manner, its chances of getting a reversal of the CAB order would have been greatly enhanced. It is regrettable that because of Island's oversight, the Los Angeles-San Francisco study was not introduced, for a presentation of the study and a sound argument showing its applicability

⁴² *Id.* at 3.

⁴³ 235 F.2d 845 (D.C. Cir. 1956).

⁴⁴ *Id.* at 850-51.

⁴⁵ *Island Airlines, Inc. v. CAB*, 363 F.2d at 124.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ *Ibid.* See 14 C.F.R. §§ 302.402, 302.407, & 302.408 (1965).

⁵⁰ As authority for this proposition, the court quoted from *Seaboard & Western Airlines, Inc. v. CAB*, 183 F.2d 975 (D.C. Cir. 1950):

The statute [Section 1006(e) of the Federal Aviation Act] provides that "No objection to an order of the Board shall be considered by the court unless such objection shall have been urged before the Board or, if it was not so urged, unless there were reasonable grounds for failure to do so." . . . No such grounds are shown. It follows that we could not modify or set aside the Board's order even if we regarded the objection now urged as valid.

to the Hawaiian inter-island situation might have provided a case that would act as a bench mark for a line of future CAB route decisions that would be more logical and consistent than the Board's present *ad hoc* approach.⁵¹ Nevertheless, even though Island did not make use of the traffic study, perhaps it signals a more thoroughgoing analysis of market allocations by the CAB.

At any rate, as a result of the decisions in the two *Island* cases, Hawaii, because of a quirk of geography, is the only state without control over its intrastate air traffic. The Ninth Circuit intimated that this result seems to be somewhat anomalous and may be unfair to the State of Hawaii, Island, and the two certified carriers as well.⁵² After noting that the "authorities as they now stand" constrained its decision in *Island*, the court indicated the possibility of Congress' granting an exemption to all the Hawaiian inter-island air carriers. Because these carriers, except for a geographical happenstance, could operate wholly within the state free from CAB jurisdiction, and because of the limited nature (both geographical and economic) of the market, a legislative exemption would be in order. In this way Hawaii would be on a parity with its sister states in regard to regulation of its intrastate air transportation.

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⁵¹ See Silberman, *supra* note 25.

⁵² *Island Airlines, Inc. v. CAB*, 363 F.2d at 125-26.